12-163

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 304.

ORRIN W. POTTER, EXECUTOR OF EBER B. WARD, DECEASED,

vs.

THE THIRD NATIONAL BANK OF CHICAGO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 15, 1877.

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Oct. 27. 1880

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Thursday, the twenty-sixth day of July, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second year.

WILLIAM H. BRADLEY, *Clerk.*

THE THIRD NATIONAL BANK OF CHICAGO
v.
ORRIN W. POTTER, EXECUTOR OF EBER B. WARD, deceased. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 28th day of April, A. D. 1874, came the said plaintiff, The Third National Bank of Chicago, by Messrs. Thompson and Bishop, its attorneys, and filed in the office of the clerk
2 of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, its bond for costs and præcipe for a writ of summons against said defendant in said entitled cause, which said bond for costs and præcipe are respectively in the words and figures following, to wit:

Bond for costs.

Circuit court, to the July term, A. D. 1874.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THE THIRD NATIONAL BANK OF CHICAGO
v.
EBER B. WARD. } In assumpsit.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, hereby agree and stipulate that execution may issue against our property for any costs taxed against it. Dated this 28th day of April, A. D. 1874.

THOMPSON AND BISHOP.

(Endorsed:) Filed April 28th, A. D. 1874. Wm. H. Bradley, clerk.

3 *Præcipe.*

In the United States circuit court for the northern district of Illinois.

THE THIRD NATIONAL BANK OF CHICAGO
vs.
EBER B. WARD.

Please issue summons in above-entitled cause on a plea of trespass on the case on promises, to the July term, A. D. 1874; damages thirty thousand dollars.

THOMPSON AND BISHOP,
Att'ys for Pl'ff.

WM. H. BRADLEY, Esq., *Clerk.*

(Endorsed:) Filed April 28, 1874. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 28th day of April, A. D. 1874, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, *ss:*

The United States of America to the marshal of the northern
4 district of Illinois, greeting:

We command you to summon Eber B. Ward, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of July next, to answer unto The Third National Bank of Chicago of a plea of trespass on the case upon promises, to its damage as it alleges of thirty thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 28th day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I have served the within writ by reading the same to and within the presence and hearing of Eber B. Ward, therein named, on the 28th day of April, 1874.

B. H. CAMPBELL,
U. S. Marshal,
By A. C. CAMPBELL, *Deputy.*

5 (Endorsed:) Filed April 30th, A. D. 1874. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 26th day of June, A. D. 1874, said plaintiff by its attorneys filed in said clerk's office its declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

In the circuit court of the United States for the northern district of Illinois, to the July term, A. D. 1874.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The Third National Bank of Chicago, a corporation organized by said name under and by virtue of the law of the United States, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and located and doing business in the city of Chicago, in said district, and which is, within the meaning of the Constitution and laws of the United States, a citizen of the State of Illinois, plaintiff in this suit, by Thompson and Bishop, its attorneys, com-

6 plains of Eber B. Ward, who is a citizen of the State of Michigan, defendant herein, who was summoned, &c., of a plea of trespass on the case on promises.

For that whereas the Burlington and Southwestern Railway Company, a corporation organized and incorporated and existing under and by virtue of the laws of the States of Iowa and Missouri, heretofore, to wit, on the 7th day of April, A. D. 1873, at Burlington, Iowa (that is to say, at the northern district of Illinois), made its certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay at offices of Elijah Smith, ℅12 Sears Building, Boston, Mass., six months after the date thereof, to the order of the Wyandotte Rolling Mill Company, by the name and style of the Wyandotte Rolling Mill Co., eight thousand dollars, for value received, and then and there delivered the said promissory note to the said Wyandotte Rolling Mill Company.

And the said Wyandotte Rolling Mill Company afterwards, to wit, on the day and year aforesaid, at said district, endorsed, assigned,
7 and delivered the said promissory note to the said defendant, who afterwards, to wit, on the day and year aforesaid, and at the district aforesaid, and in said State of Illinois, by the style and description of E. B. Ward, endorsed, assigned, and delivered said promissory note to the plaintiff; and the plaintiff avers that when said promissory note became due the maker thereof had left the State of Illinois, and then was and has since continued to be wholly insolvent, so that a suit against said maker would, from the time said note became due down to the time of the commencement of this suit, have been unavailing by reason of the insolvency of said maker.

By reason whereof, and by force of the statute of the State of Illinois, the said defendant afterwards, to wit, on the 11th day of October, A. D. 1873, at said northern district of Illinois, became liable to pay to the said plaintiff the said sum of money in said promissory note specified according to the tenor and effect of said note, and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the northern district of Illinois aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in said note specified according to the tenor and effect thereof.

And for that whereas also the Burlington and Southwestern
8 Railway Company, a corporation organized under the laws of the States of Iowa and Missouri, by Henry Hatch, its treasurer, heretofore, to wit, on the 7th day of April, at Burlington, Iowa, to wit, at said district, made its other certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, and thereby then and there promised to pay, at office of Elijah Smith, ℅ 12 Sears Building, Boston, Mass., six months after the date thereof, to the order of the Wyandotte Rolling Mill Company, the sum of eight thousand dollars, value received, and then and there delivered the said promissory note to the said Wyandotte Rolling Mill Company.

And the said Wyandotte Rolling Mill Company, to whose order the payment of the said sum of money in said note specified was to be made, after the making of said note and before the payment of said sum of money, to wit, on the day and year last aforesaid, at the district aforesaid, endorsed the said promissory note and then and there delivered the said promissory note so endorsed to the said defendant; and the said defendant, afterwards, to wit, on the day and year last aforesaid, at the

district aforesaid, endorsed the said promissory note and then and there delivered the said promissory note so endorsed to the said plaintiff, and the said plaintiff avers that afterwards and when said promissory
9 note became due and payable, to wit, on the 10th day of October, A.D. 1873, at office of Elijah Smith, ℔ 12 Sears Building, Boston, Mass., to wit, at the district aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of money therein specified was then and there duly required according to the tenor and effect of said note; but that neither the said Elijah Smith nor the maker of said note, nor the said defendant nor any other person or persons, did, or would then or at any time before or afterwards, pay the said sum of money in said note specified or any part thereof, but wholly neglected and refused so to do; of all which said several promises the said defendant afterwards, to wit, on the day and year last aforesaid, at said district, had notice, by means whereof the said defendant became liable to pay to the said plaintiff the said sum of money in said promissory note specified, when he, the said defendant should be thereunto afterwards requested; and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in said promissory note specified, when he, the said defendant, should be thereunto afterwards requested.

10 And for that whereas also one The Burlington and Southwestern R'y Co., heretofore, to wit, on the 7th day of April, A. D. 1872, at Burlington, Iowa (to wit, at Burlington, in the northern district of Illinois), made its other certain promissory note, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, and thereby then and there promised to pay at office of Elijah Smith, ℔12 Sears Building, Boston, Mass., six months after the date thereof, to the order of the Wyandotte Rolling Mill Co., eight thousand dollars, value received, and then and there delivered the said promissory note to the said The Wyandotte Rolling Mill Co., and the said Wyandotte Rolling Mill Co. afterwards, to wit, on the day and year last aforesaid, at Chicago, in the State of Illinois, to wit, at said district, endorsed and delivered said promissory note to the plaintiff; and the said defendant, after the delivery of said note to the said Wyandotte Rolling Mill Co., and before the delivery of said note to the plaintiff, endorsed the said note, whereby the said defendant became liable to pay said note in case said note was not paid by the maker thereof at its maturity; and the plaintiff avers that afterwards when said promissory note became due and payable according to its tenor and effect, to wit, on the 10th day of October, A. D. 1873, at office of Elijah Smith, ℔12
11 Sears Building, Boston, Mass., to wit, at said district, the said note was duly presented and shown for payment thereof, and payment of the said sum of money therein specified was then and there duly required, but that neither the said Elijah Smith nor the Burlington and Southwestern Railway Co., the said maker, nor any person or persons on behalf of said maker, did or would when said note was presented and shown for payment thereof as aforesaid, or any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do (of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at said district, had notice). By means whereof the said defendant then and there became liable to pay to the said plaintiff the said sum of money in said promissory note specified when he, the said de-

fendant, should be thereunto afterwards requested; and being so liable, he, the said defendant, in consideration thereof afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in said promissory note specified, when he, the
12 said defendant, should be thereunto afterwards requested.

And for that whereas also The Burlington and Southwestern Railway Company, a corporation incorporated and organized under the laws of the States of Iowa and Missouri, heretofore, to wit, on the 11th day of April, A. D. 1873, at Burlington, Iowa, that is to say, at the northern district of Illinois aforesaid, by the name, style, and description of the Burlington and Southwestern R'y Co., by Henry Hatch, treas., made its certain other promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, and thereby then and there promised to pay, at office of Elijah Smith, ⅋12 Sears Building, Boston, Mass., six months after the date thereof, to the order of Wyandotte Rolling Mill Company, by the name, style and description of Wyandotte Rolling Mill Co., the sum of eight thousand dollars, value received, and then and there delivered the said promissory note to the said Wyandotte Rolling Mill Company; and the said Wyandotte Rolling Mill Company, to whose order said sum of money in said promissory note specified was made payable, afterwards,
13 to wit, on the day and year, and at the district last aforesaid, by the style and description of Wyandotte R. M. Co., by E. B. Ward, pres't, indorsed, assigned and delivered said note to the said defendant, and the said defendant, to whom said sum of money in said note specified was payable, by the indorsement and assignment of said note, afterwards, to wit, on the day and year last aforesaid, at Chicago, in the State of Illinois, to wit, at Chicago, in said northern district of Illinois aforesaid, indorsed, assigned and delivered said promissory note to the plaintiff; and the plaintiff avers that when said promissory note became due and payable the said Burlington and Southwestern Railway Company had no property subject to execution within the State of Illinois, and was, and has since continued to be insolvent, and that a suit against the said Burlington and Southwestern Railway Company, the maker of said note, would, from the time when said note became due down to the time of the institution of this suit, have been wholly unavailing by reason of the insolvency of said maker. By reason whereof and by force of the statute of the State of Illinois, the said defendant became
14 liable to pay to the said plaintiff the said sum of money in said promissory note specified according to the tenor and effect of said note; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the 15th day of October, A. D. 1873, at the northern district of Illinois aforesaid, undertook and then and there faithfully promised the said plaintiff to pay the said plaintiff the said sum of money in said promissory note specified according to the tenor and effect thereof.

And for that whereas also The Burlington and Southwestern Railway Company heretofore, to wit, on the 11th day of April, A. D. 1873, at Burlington, Iowa, to wit, at said northern district of Illinois, by the name, style and description of the Burlington and Southwestern R'y Co., by Henry Hatch, treas., made its other certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, and thereby then and there promised to pay, at office of Elijah Smith, ⅋12 Sears Building, Boston, Mass., six months after the date thereof, to the order of Wyandotte Roll

ing Mill Company, by the name style and description of Wyandotte Rolling Mill Co., the sum of eight thousand dollars, value
15 received, and then and there delivered said note to the said Wyandotte Rolling-Mill Company. And the said Wyandotte Rolling-Mill Company, to whose order the said sum of money in said note specified was to be made, after the making of said note and before the payment of said sum of money therein specified, to wit, on the day and year last aforesaid, and at the district aforesaid, endorsed the said promissory note and delivered the same to the defendant, and the said defendant afterwards, to wit, on the day and year and at the district last aforesaid, by his hand endorsed the said promissory note and delivered the said note so endorsed to the plaintiff, and the said plaintiff avers that afterwards, and when said promissory note became due and payable, to wit, on the 14th day of October, A. D. 1873, at office of Elijah Smith, ℅ 12 Sears Building, Boston, Mass., to wit, at said district, the said promissory note was duly presented and shown for payment and payment thereof was duly demanded according to the tenor and effect of said note, but that neither the said Elijah Smith nor the maker of said note, nor any person or persons for said maker, did or would
16 then or at any other time before or afterwards pay the said sum of money in said note specified or any part thereof, but wholly neglected and refused so to do, of all which said several premises the said defendant afterwards, to wit, on the day and year and at the district last aforesaid, had notice, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money in said promissory note specified when he, the said defendant, should be thereunto afterwards requested; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year and at the district last aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in said note specified when he, the said defendant, should be thereunto afterwards requested.

And for that whereas also one The Burlington and Southwestern R'y Co., heretofore, to wit, on the 11th day of April, A. D. 1873, at Burlington, Iowa, to wit, at the northern district of Illinois aforesaid, made its certain other promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid,
17 and thereby then and there promised to pay, at office of Elijah Smith, ℅ 12 Sears Building, Boston, Mass., six months after the date thereof, to the order of Wyandotte Rolling-Mill Co., the sum of eight thousand dollars, value received, and then and there delivered said note to the said Wyandotte Rolling Mill Co., and the said Wyandotte Rolling-Mill Co. afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, endorsed and delivered said note to the plaintiff, and the said defendant, before the delivery of said promissory note to the said plaintiff, by his hand endorsed the said promissory note; and the plaintiff avers that afterwards, when said note became due and payable according to its tenor and effect, to wit, on the 14th day of October, A. D. 1873, at office of Elijah Smith, ℅ 12 Sears Building, Boston, Mass., to wit, at said district, the said note was duly presented and shown for payment, and payment thereof was then and there duly required, but that neither the said Elijah Smith nor the said Burlington and Southwestern R'y Co., nor any person or persons on behalf of the maker of said note, did or would then or at any time before or
18 afterwards pay said sum of money in said note specified or any part thereof, but wholly neglected and refused so to do, of all which said premises the said defendant afterwards, to wit, on the day

and year last aforesaid, at the district aforesaid, had notice, by manse whereof the said defendant afterwards, to wit, on the 15th day of October, A. D. 1873, at said district, became liable to pay to the plaintiff the said sum of money in said promissory note specified when he, the said defendant, should be thereunto afterwards requested; and being so liable, he, the said defendant, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, in consideration thereof undertook and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sum of money in said promissory note specified when he, the said defendant, should be thereunto afterwards requested.

And for that whereas also the Burlington and Southwestern Railway Company, a corporation incorporated and organized under the laws of the States of Iowa and Missouri, heretofore, to wit, on the 16th day of April, A. D. 1873, at Burlington, Iowa, that is to say, at the north-
19 ern district of Illinois aforesaid, by the name, style, and description of the Burlington and Southwestern R'y Co., by Henry Hatchtreas., made its certain other promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, and thereby then and there promised to pay, at office of Elijah Smith, ℀ 12 Sears Building, Boston, Mass., six months after the date thereof, to the order of Wyandotte Rolling-Mill Company, the sum of sixty-five hundred and eight $\frac{34}{100}$ dollars, value received, and then and there delivered the said promissory note to the said Wyandotte Rolling Mill Company, and said Wyandotte Rolling-Mill Company, to whose order said sum of money in said promissory note specified was made payable, afterwards, to wit, on the day and year and at the district last aforesaid, by the style and description of Wyandotte R. M. Co., by E. B. Ward, pres't, endorsed, assigned, and delivered the said note to the said defendant; and the said defendant, to whom said sum of money in said note specified was payable, by the endorsement and assignment of said note, afterwards, to wit, on the day and year last aforesaid, at Chicago, in the State of Illinois, to wit, at Chicago, in said northern district of Illinois aforesaid, endorsed, assigned, and delivered said promissory note to the plaintiff, and the plaintiff avers that
20 when said promissory note became due and payable the said Burlington and Southwestern Railway Company had no property subject to execution within the State of Illinois, and was and has since continued to be insolvent, and that a suit against the said Burlington and Southwestern Railway Company, the maker of said note, would, from the time when said note became due down to the time of the institution of this suit, have been wholly unavailing by reason of the insolvency of said maker. By reason whereof, and by force of the statute of the State of Illinois, the said defendant became liable to pay to the said plaintiff the said sum of money in said promissory note specified according to the tenor and effect of said note; and being so liable, in consideration thereof, the said defendant afterwards, to wit, on the 19th day of October, A. D. 1873, at said district, undertook, and then and there faithfully promised the said plaintiff, to pay to the said plaintiff the said sum of money in said note specified according to the tenor and effect of said note.

And for that whereas also one The Burlington and Southwestern R'y Co., heretofore, to wit, on the 16th day of April, A. D. 1873, at Bur-
21 lington, Iowa, to wit, at said district, made its other certain promissory note, and then and there delivered said note, to the Wyandotte Rolling-Mill Company, by which said note, bearing date a certain day

and year, to wit, the day and year last aforesaid, the said Burlington and Southwestern R'y Co. promised to pay, at office of Elijah Smith, ℅ 12 Sears Building, Boston, Mass., six months after the date thereof, to the order of the said Wyandotte Rolling-Mill Company, the sum of sixty-five hundred and eight and $\frac{34}{100}$ dollars, value received; which said promissory note afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, the said defendant under his hand endorsed, and which said promissory note after the making thereof, and after the endorsement thereof by said defendant, the said Wyandotte Rolling-Mill Company endorsed and delivered to the plaintiff; and the plaintiff avers that afterwards when said note became due and payable according to its tenor and effect, to wit, on the 18th day of October, A. D. 1873, at office of Elijah Smith, ℅ 12 Sears Building, Boston, Mass., to wit, at the district aforesaid, the said note was duly presented and shown for payment and payment thereof was then and there
22 duly required, but that neither the said Elijah Smith, nor the said maker of said note, nor any person or persons for or on behalf of said maker, did or would, then or at any other time, pay said sum of money in said note specified or any part thereof, but wholly neglected and refused so to do; of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, had notice, by means whereof the said defendant afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, became liable to pay the said plaintiff the said sum of money in said promissory note specified when he, the said defendant, should be thereunto afterwards requested; and being so liable, in consideration thereof, he, the said defendant, afterwards, to wit, on the day and year last aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sum of money in said promissory note specified when he, the said defendant, should be thereunto afterwards requested.

For that whereas also the Burlington and Southwestern Railway Company heretofore, to wit, on the 16th day of April, in the year of our Lord, one thousand eight hundred and seventy-three, at Burling-
23 ton, Iowa, to wit, at the northern district of Illinois aforesaid, made a certain other note in writing, commonly called a promissory note, and then and there delivered the said note to the Wyandotte Rolling-Mill Company, by which said note the said maker promised to pay to the said Wyandotte Rolling-Mill Company, by the name, style, and description of , at office of Elijah Smith, ℅ 12 Sears Building, Boston, Mass., six months after the date thereof, the sum of sixty-five hundred and eight $\frac{24}{100}$ dollars, for value received, and the said Wyandotte Rolling-Mill Company, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterwards, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the sum of money due upon and mentioned in the said note to be paid to the defendant herein, or order, and then and there delivered the said note so endorsed to the said defendant, who afterwards and be-
24 fore the payment of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in

writing, and by that endorsement ordered and appointed the sum of money due upon and mentioned in the said note to be paid to William Sturgis or order, and then and there delivered the said note so endorsed to the said William Sturgis, who afterwards, and before the payment of the said sum of money mentioned in the said note, or of any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the sum of money due upon and mentioned in the said note to be paid to the said plaintiff or order, and then and there delivered the said note so endorsed to the said plaintiff; of which said endorsements so made thereon as aforesaid the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. By reason whereof, and by force of the statute in such case made and provided, the
25 said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note, and of the said endorsements so thereon made as aforesaid; and being so liable, the said defendant in consideration thereof afterwards, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid. And whereas also the said defendant afterwards, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and seventy-four, at the place aforesaid, was indebted to the said plaintiff in the sum of thirty thousand dollars lawful money of the United States of America, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant, and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant at the like request of the said defendant, and for other money by
26 the said defendant before that time had and received to and for the use of the said plaintiff, and in the further sum of thirty thousand dollars for interest upon and for the forbearance of divers sums of money due from said defendant to said plaintiff; and being so indebted, the said defendant in consideration thereof afterwards, to wit, on the same day and year aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in this count mentioned when the said defendant should be thereunto afterwards requested; and whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of thirty thousand dollars of like lawful money as aforesaid; and being so found in arrear and indebted to said plaintiff, the said defendant, in consideration
27 thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised to the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, although often requested, &c., to wit, on the day when the said notes became due and payable according to the tenor and effect thereof, and oftentimes since, to wit, at the place aforesaid, has not yet paid the said several sums of money above mentioned, or any or either of them or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still doth refuse, to the damage of the said plaintiff of thirty thousand dollars, and therefore the said plaintiff brings suit, &c.

By THOMPSON AND BISHOP,
Plaintiff's Attorneys.

Copies of notes on which suit is brought.

$8,000.00.] BURLINGTON, IOWA, *April 7th*, 1873.

Six months after date the Burlington and Southwestern R'y Co. promise to pay to the order of the Wyandotte Rolling Mill Co. eight thousand dollars, at office of Elijah Smith, #12 Sears Building, Boston,
28 Mass., value received.

(Signed) THE BURLINGTON AND SOUTHWESTERN R'Y CO.,
By HENRY HATCH, *Trea.*

(Endorsed:) Wyandot' R. M. Co., by E. B. Ward, pres't. E. B. Ward

$8,000.00.] BURLINGTON, IOWA, *April 11th*, 1873.

Six months after date the Burlington and Southwestern R'y Co. promise to pay to the order of Wyandotte Rolling Mill Co. eight thousand dollars, at office of Elijah Smith, #12 Sears Building, Boston, Mass., value received.

(Signed) THE BURLINGTON AND SOUTHWESTERN R'Y CO.,
By HENRY HATCH, *Trea.*

(Endorsed:) Wyandot' R. M. Co., by E. B. Ward, pres't. E. B. Ward

$6,508.34.] BURLINGTON, IOWA, *April 16th*, 1873.

Six months after date the Burlington and Southwestern R'y Co. promise to pay to the order of the Wyandotte Rolling Mill Company sixty-five hundred and eight $\frac{34}{100}$ dollars, at office of Elijah Smith, #12 Sears Building, Boston, Mass., value received.

(Signed) THE BURLINGTON AND SOUTHWESTERN R'Y CO.,
By HENRY HATCH, *Trea.*

29 (Endorsed:) Wyandot' R. M. Co., by E. B. Ward, pres't. E. B Ward, Wm. Sturgis.

(Endorsed:) Filed this 26th day of June, A. D. 1874. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 17th day of November, A. D. 1874, said defendant by his attorneys filed in said clerk's office his plea and stipulation in said entitled cause, which said plea and stipulation is in the words and figures following, to wit:

Plea and stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States, northern district of Illinois.

THE THIRD NATIONAL BANK OF CHICAGO
v.
EBER B. WARD. } Assumpsit.

And the said defendant, by T. C. Owen and George Willard, his attorneys, comes and defends the wrong and injury when, &c., and says that it did not undertake and promise in manner and form as the said plaintiff has in his said declaration alleged against him, and of
30 this he puts himself upon the country, &c.

T. C. OWEN AND GEORGE WILLARD,
Att'ys for Plaintiff.

It is hereby stipulated and agreed that upon the trial of the above entitled cause any and all competent and legal evidence of any alleged fact or facts which the defendant could or might have pleaded specially as a defence to the whole or any part of said action shall be received under the plea of the general issue above pleaded, and shall have and receive the same force and effect as though special pleas had been filed and under which the evidence so offered would have been admissible, and pl'ff may introduce any evidence in rebuttal which would be admissible if set out in replications.

THOMPSON AND BISHOP,
Att'ys for Plaintiff.
T. C. OWEN AND GEORGE WILLARD,
Att'ys for Deft.

(Endorsed:) Filed Nov. 17, 1874. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 22d day of March, A. D. 1875, in the adjourned March term of said court, in the record of the proceed-
31 ings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE THIRD NATIONAL BANK OF CHICAGO
v.
EBER B. WARD. } Assumpsit.

Now comes the plaintiff by its attorney and suggests to the court the death of the defendant, Eber B. Ward, and on motion of the plaintiff's attorney it is ordered that the executors ot said Eber B. Ward be substituted as the defendant herein.

Afterwards, to wit, on the 24th day of April, A. D. 1876, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE THIRD NATIONAL BANK OF CHICAGO
vs.
EBER B. WARD. } Assumpsit.

Now come the parties by their attorneys, and George Willard, esq., attorney for the defendant, suggests to the court the death of the defendant and the appointment of Orrin W. Pottor, George H. Wyman, and Tubal C. Owen and Samuel R. Mumford as his executors, and on motion of said attorney it is ordered that said executors be substituted as the defendants herein in place of said deceased, and on motion of the plaintiff by his attorney leave is given to amend its declaration.

32

Afterwards, to wit, on the 16th day of May, A. D. 1877, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE THIRD NATIONAL BANK OF CHICAGO
vs.
ORRIN W. POTTER, GEORGE H. WYMAN, Tubal C. Owen, and Samuel R. Mumford, executors of Eber B. Ward, deceased. } Assumpsit.

Now come the parties by their attorneys, and the plaintiff's attorney suggests to the court the resignation of said George H. Wyman, Tubal C. Owen, and Samuel R. Mumford as executors of Eber B. Ward, deceased, and on his motion it is ordered that this cause be dismissed as to them, and upon issue joined herein thereupon come a jury of good and lawful men, to wit, D. G. Bean, O. H. Salisbury, D. G. Courtney, Thomas Carr, James Braxfield, B. R. Waggoner, P. Ray Isham, E. H. Kelburn, Zalmon D. Root, Roland Wheeler, Louis J. Levin, and T. T. Manly, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

33

Afterwards, to wit, on the 17th day of May, A. D. 1877, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE THIRD NATIONAL BANK OF CHICAGO
v.
ORRIN W. POTTER, EXECUTOR OF EBER B. Ward, deceased. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

34

Afterwards, to wit, on the 18th day of May, A. D. 1877, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE THIRD NATIONAL BANK OF CHICAGO
vs.
ORRIN W. POTTER, EXECUTOR OF EBER B. Ward, deceased. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and on motion of the plaintiff's attorney leave is given to amend the declaration, to which the defendant's attorney excepts, and after hearing the concluding arguments of counsel and receiving the instructions of the court the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit, "We, the jury, find the issue for the plaintiff, and assess its damages to the sum of twenty-seven thousand one hundred and sixty-six dollars and sixty-six cents," and thereupon the defendant, by his attorney, moves the court for a new trial herein.

And on the same day, to wit, the 18th day of May, A. D.
35 1877, the said plaintiff by its attorneys filed in said clerk's office its amendments to its declaration in said entitled cause, which said amendments are in the words and figures following, to wit:

Amendments to declaration.

In the circuit court of the United States for the northern district of Illinios, May term, A. D. 1877.

THE THIRD NATIONAL BANK OF CHICAGO
v.
ORRIN W. POTTER, EXECUTOR OF THE LAST will and testament of Eber B. Ward, deceased. } Assumpsit. Additional counts to declaration.

UNITED STATES OF AMERICA,
Nothern District of Illinois, ss :

For that whereas also the Burlington and South-Western Railway Company, a corporation organized under the laws of the States of Iowa and Missouri heretofore, to wit, on the 7th day of April, A. D. 1873, at Burlington, Iowa, to wit, at said northern district of Illinois, made its other certain promissory note bearing date a certain day and year, to wit, the day and year last aforesaid, and thereby promised to pay
36 at office of Elijah Smith #12 Sears building, Boston, Mass., six months after the date of said note, to the order of the Wyandotte Rolling Mill Company, by the name and style of the Wyandotte Rolling Mill Co., the sum of eight thousand dollars for value received, and then and there delivered said note to the said Wyandotte Rolling Mill Company, which afterwards, to wit, on the day and year and at the place aforesaid, endorsed and delivered said note to Eber B. Ward, who afterwards, to wit, on the day and year and at the place aforesaid, endorsed and delivered said note to the plaintiff.

And the said plaintiff further saith, that afterwards, when the said promissory note became due and payable, to wit, on the 10th day of October, A. D. 1873, the said plaintiff was ready and willing in due manner to present and show the said promissory note for payment thereof, and to demand payment of the said sum of money therein specified, according to the tenor and effect thereof, and would accord-

ingly have presented the same and demanded payment thereof at office of Elijah Smith, ℅12 Sears building, Boston, Mass., to wit, at the district aforesaid, whereof the said Eber B. Ward then and there and in his lifetime had notice, but the said Eber B. Ward then and there
37 and in his lifetime wholly dispensed with and discharged the said plaintiff from the presentment of the said last mentioned promissory note for payment thereof, by means whereof, after the said promissory note became due and payable according to the tenor and effect thereof, to wit, on the day and year last aforesaid, at the district aforesaid, the said Eber B. Ward became liable to pay to the said plaintiff the said sum of money in the said promissory note specified when he, the said Eber B. Ward, should be thereunto afterwards requested, and being so liable, he, the said Eber B. Ward, in consideration thereof, afterwards, and in his lifetime, to wit, on the day and year last aforesaid, at the district last aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money in the said promissory note specified when he, the said Eber B. Ward, should be thereunto afterwards requested.

And for that whereas also the Burlington and Southwestern Railway Company, a corporation organized under the laws of the State of Iowa and Missouri, heretofore, to wit, on the 11th day of April A. D. 1873, at Burlington, Iowa, to wit, at said district, made its certain other note in writing, commonly called a promissory note, and thereby
38 then and there promised to pay to the order of the Wyandotte Rolling Mill Company, six months after date of said note, eight thousand dollars at office of Elijah Smith, ℅12 Sears building, Boston, Mass., and then and there delivered said note to the Wyandotte Rolling Mill Company; and the said Wyandotte Rolling Mill Company then and there endorsed and delivered said note to Eber B. Ward, who then and there endorsed and delivered said note to the plaintiff; and the said plaintiff further saith that afterwards, when the said promissory note became due and payable according to the tenor and effect thereof, to wit, on the 14th day of October, A. D. 1873, the said plaintiff was ready and willing in due manner to present and show the said promissory note to the said Burlington and Southwestern Railway Company for payment thereof, and to demand of the said Burlington and Southwestern Railway Company payment of the sum of money therein specified according to the tenor and effect thereof, and would accordingly have presented the same and demanded payment thereof at office of Elijah Smith, ℅12 Sears building, Boston, Mass., to wit, at the district
39 aforesaid, whereof the said Eber B. Ward then and there had notice, but the said Eber B. Ward then and there requested the said plaintiff not to present said promissory note for payment thereof, and wholly dispensed with and discharged the said plaintiff from the presentment of said last mentioned promissory note for payment thereof, by means whereof, after the said promissory note became due and payable according to the tenor and effect thereof, to wit, on the day and year last aforesaid, at the district aforesaid, the said Eber B. Ward became due and liable to pay to the said plaintiff the said sum of money in said note specified when he, the said Eber B. Ward, should be thereunto afterwards requested, and being so liable, he, the said Eber B. Ward, in consideration thereof, afterwards and in his lifetime, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of money when he, the said Eber B. Ward, should be thereunto afterwards requested.

And for that whereas also the Burlington and Southwestern Railway Company, a corporation duly organized under the laws of
of the States of Iowa and Missouri, heretofore, to wit, on the 16th
46 day of April, A. D. 1873, at Burlington, Iowa, to wit, at said district, made another certain note in writing, commonly called a promissory note, and thereby then and there promised to pay at office of Elijah Smith, ℔ 12 Sears building, Boston, Mass., six months after the date thereof, to the order of the Wyandotte Rolling Mill Company, the sum of sixty-five hundred and eight $\frac{34}{100}$ dollars, value received, and then and there delivered the said promissory note to the said Wyandotte Rolling Mill Company, which company afterwards, to wit, on the day and year and at the district aforesaid, endorsed and delivered said note to Eber B. Ward, who then and there, and while living, endorsed and delivered said note to the plaintiff; and the said plaintiff further saith that afterwards, when the said promissory note became due and payable according to the tenor and effect thereof, to wit, on the 18th day of October, A. D. 1873, the said plaintiff was ready and willing in due manner to present and show the said promissory note to the said Burlington and Southwestern Railway Company for payment thereof and
to demand of the said Burlington and Southwestern Railway
41 Company payment of the said sum of money therein specified according to the tenor and effect thereof, and would accordingly have presented the same to the said Burlington and Southwestern Railway Company, and have demanded payment thereof, to wit, at office of Elijah Smith, ℔ 12 Sears building, Boston, Mass., aforesaid, whereof the said Eber B. Ward then and there had notice, but the said Eber B. Ward then and there requested the said plaintiff not to present the said promissory note for payment thereof, and then and there wholly dispensed with and discharged the said plaintiff from the presentment of the said promissory note to the said Burlington and Southwestern Railway Company for payment thereof, by means whereof, after the said promissory note became due and payable according to the tenor and effect thereof, to wit, on the day and year last aforesaid, at the district aforesaid, the said Eber B. Ward became liable to pay to the said plaintiff the said sum of money in said promissory note specified when he, the said Eber B. Ward, should be thereunto afterwards requested, and being so liable, he, the said Eber B. Ward, in consideration
thereof, afterwards and during his lifetime, to wit, on the day
42 and year last aforesaid, and at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay the said plaintiff the said sum of money in the said promissory note specified when he, the said Eber B. Ward, should be thereunto afterwards requested.

Yet the said Eber B. Ward in his lifetime, not regarding his said promises and undertakings, but contriving, &c., and the said defendant, executor of the last will and testament of the said Eber B. Ward, now deceased, have not nor has either of them paid to the said plaintiff the said sums of money, or any part thereof, but so to do have wholly refused and still refuse, to the damage of the said plaintiff of thirty thousand dollars, and therefore the said plaintiff brings its suit.

By THOMPSON AND BISHOP,
Att'ys for Plaintiff.

(Endorsed:) Filed May 18, 1877. Wm. H. Bradley, c'lk.

Afterwards, to wit, on the 26th day of July, A. D. 1877, in the July term of said court, in the record of the proceedings thereof in said en-
43 titled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE THIRD NATIONAL BANK OF CHICAGO
vs.
ORRIN W. POTTER, EXECUTOR OF EBER B. WARD, deceased. } Assumpsit.

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered for a new trial of this cause, and after hearing the arguments of the defendant's counsel the court overrules said motion; to which ruling the defendant by his attorney excepts. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant, Orrin W. Potter, as executor of the last will and testament of Eber B. Ward, deceased, the said sum of twenty-seven thousand one hundred and sixty-six dollars and sixty-six cents, its damages so as aforesaid assessed, together with its costs and charges in this behalf expended, amounting to the sum of ninety-six dollars and thirty-four cents, and that it have execution therefor, to be paid in due course of administration.

44 And on the same day, to wit, the 26th day of July, A. D. 1877, on the hearing of said cause, the following exceptions were taken and allowed by the court, and made of record in said entitled cause, in the words and figures following, to wit:

Bill of exceptions.

45 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States, term, A. D. 1877.

THE THIRD NATIONAL BANK OF CHICAGO
vs.
ORRIN W. POTTER ET AL., EXECUTORS.

Be it remembered that on the trial of this cause the plaintiff introduced evidence tending to show that in the month of April, 1873, said plaintiff, at the city of Chicago, Cook County, Illinois, loaned to Eber B. Ward, on call, the sum of forty thousand dollars, and as collateral security therefor received the certain promissory notes described in the declaration, to wit: First, a note of the Burlington and Southwestern Railway Company, made payable to the Wyandott Rolling Mill Company, for $8,000, dated April 7, 1873, payable six months after date at the office of Elijah Smith, No. 12 Sears building, Boston, Massachusetts; second, the note of said railway company, payable to the Wyan-
46 dott Rolling Mill Company, for $8,000, dated Burlington, Iowa, April 11, 1873, payable six months after date at the office of Elijah Smith, No. 12 Sears building, Boston, Massachusetts; third, a note of the Burlington and Southwestern Railway Company, to the Wyandott Rolling Mill Company for $6,508.34, dated April 16, 1873, payable six months after date at the office of Elijah Smith, Boston, Massachusetts, all of said notes being endorsed by the Wyandott Roll-

ing Mill Company, per E. B. Ward, president, and by E. B. Ward and William Sturgess, and to which notes certificates of protest were attached.

Plaintiff also introduced in evidence the said promissory notes, the same having been duly described in the declaration in said cause.

Plaintiff also introduced evidence tending to show that demand having been made for said loan, and the same not having been paid, said notes were by the plaintiff sent to the Second National Bank of Boston, in the State of Massachusetts, for presentation for payment and collection; that said notes were respectively presented for payment, and the same not having been paid, each of them were protested, and notices in writing of such protest for each of the endorsers were mailed to
47 the address of said plaintiff at Chicago, the notary certifying that he did not know the residence of the said endorsers, and on the receipt of the said notices which were intended for the said Sturgess and the said Ward the same were sent to the said Sturgess and Ward. It was admitted by the said Sturgess in open court that he received the notice intended for him. It was also admitted that the address of said Ward was Detroit, Michigan, but there was no evidence showing that the notice intended for him was actually mailed to him at his said address. Evidence was introduced tending to show that in the due course of the business in the office of said plaintiff said notice, if received from the notary at Boston, would have been forwarded to said Ward to his address at Detroit, but none of the officers or clerks of the plaintiff could recollect affirmatively or positively of the transaction, and the only evidence upon the question of whether the notice was forwarded to Ward or not was evidence as to the course of business in the office, to which evidence the def't objected, but the court overruled the objection and allowed evidence to the effect that by the due course of business in pl'ff's office the notices would have been forwarded by mail to Ward if they had been received from the notary, to which def't excepted.

48 Plaintiff also introduced evidence tending to show that said E. B. Ward was president of the Wyandott Rolling Mill Company, of Wyandott, in the State of Michigan; that said rolling mill company contracted to sell to said Burlington and Southwestern Railway Company, which was a corporation for railway purposes, created and existing in the State of Iowa, 2,500 tons of iron rails for $225,000, for payment of which it was agreed between the said rolling mill company and the said railway company that said railway company would execute promissory notes payable to the order of said rolling mill company; that said Ward would endorse said notes as president and individually, and sell or pledge them.

Evidence was also given tending to show that it was agreed between said rolling mill company and said railway company that if said railway company was unable to pay said notes at maturity the same should be renewed, and that the notes in question had been given as a second renewal of the original notes given for said iron.

Evidence was also given tending to show that the said Elijah Smith was the agent and broker of the said Ward, and of the said rolling mill company, and of said railway company in the matter of
49 negotiating paper for them respectively, and that in the month of April, 1873, said Smith, who was also then the president of said railway company, at the instance of said Ward, sought to make a loan of $40,000 for the purpose of taking up certain of said series of notes, which had then matured or were about maturing, upon the notes

in question and others of the same character as collateral security; that one William Sturgess, whose name appears as endorser upon said notes, suggested to the said Smith that said loan could be made of the plaintiff, and at the request of said Smith said Sturgess took said notes from Boston to Chicago and applied for such loan, and the plaintiff made said loan on call, taking the notes in question and three other notes of similar amount as collateral security.

Plaintiff also introduced evidence tending to show that about the time said notes fell due said Smith, at the instance of Ward, requested the Second National Bank of Boston, to whom said notes had been sent for collection, not to protest said notes, as he was making arrangements to raise money to pay half the loan and to extend the balance. Said Ward was at this time the president and said Smith the vice-president of said railroad company.

Plaintiff also introduced evidence tending to show that, at about the time the said notes fell due, certain parties residing
50 at New Bedford, Massachusetts, who were interested as stockholders and bondholders of the said Burlington and Southwestern Railway Company, raised the sum of one hundred thousand dollars and placed it in the hands of the said Ward for the purpose of meeting certain liabilities which said Ward had incurred as indorser for said company, among which was the forty thousand dollar loan in question; that, at the instance of said Ward, after said money was raised, application was made to said plaintiff to accept one-half of said loan and extend the balance for sixty days so as to enable Ward to use $20,000 of said fund to meet other obligations where he was liable as endorser for said railway company. The plaintiff, with the consent of said Sturges, agreed to such extension, and on the 17th of October received one-half of said loan and delivered over one-half the collaterals, retaining the notes described in the declaration. The Second National Bank of Boston, not having been instructed, however, to withhold protest, caused said notes to be protested, as above stated, and the same, after protest, were returned to the possession of the plaintiff.

During the trial plaintiff called William Sturgess, whose name appears upon said paper, as a witness in said cause, who gave testi-
51 mony tending to show that said loan was made through his agency for the benefit of said Ward, at the instance of said Smith. In the course of his examination the following question was asked said Sturges: "Did you have any interview with Mr. Ward after the making of the said loan with reference to these notes, or any conversation with him?"

To which question counsel for the defendant then and there objected on the ground of incompetency, said Ward being deceased and said witness being interested in the result of said suit, which said objection the court overruled; to which ruling of the court the said defendant then and there excepted. Thereupon said witness answered said question, stating in substance that he met said Ward in the city of Detroit, on the 4th day of July, 1873, and there had a conversation with said Ward, in which witness informed him that he, said witness, had got the money of the plaintiff for Smith and Ward, at which Ward seemed gratified, and asked witness if he, witness, could not probably carry it along a while for him, Ward. Witness replied that he though likely he could.

Plaintiff also introduced evidence tending to show that at the
52 time of the making of the said notes by said railway company to said rolling mill company, three hundred thousand dollars of the

first mortgage-bonds of said railway company were pledged and left with said rolling mill company as collateral security for the payment of said notes, and that in the fall of 1873 said rolling mill company delivered said bonds to said Ward to indemnify him for his liability as endorser on said notes; and it was admitted on said trial that at the time said bonds were turned over to said Ward they were worth something, but had no quotable market value.

Plaintiff also introduced evidence tending to show that at the time said notes matured said Ward was lessee of the railway and of the property, rights, and franchises of said railway company and had possession thereof.

Plaintiff also introduced in evidence the following letters:

The said J. Irving Pearce being president, and said L. V. Parsons cashier of said plaintiff.

That said Parsons, by letter dated October 2nd, 1873, addressed
53 to said Ward, at Detroit, notified him that plaintiff held the notes in question, and that said notes were at the Second National Bank, at Boston, and must be paid.

2.

BOSTON, *October 11th*, 1873.

J. IRVING PEARCE, Esq.,
Pres't 3rd National Bank, Chicago, Ill.:

I received your dispatch in reply to mine about the notes. I was in New Bedford with Capt. Ward trying to raise money. Found it impossible to raise enough to take care of the paper, all of it, but I think by Wednesday, possibly Tuesday, shall have money to pay one-half and extend the other 60 days. Could not get it in time to save protest of one of the notes. I am sorry we have to ask the favor, as I have no doubt you need funds for the whole amount, and am greatly obliged for your complying with the request in giving the extension.

Yours, truly,

ELIJAH SMITH.

I don't hardly know whether to deposit funds here and send
54 you new notes or get order for old ones or send you direct. Will be better perhaps to send whole to you.

E. S.

3.

On the 16th of said October, said Smith wrote, in substance, to S. P. Burt, treasurer of the said railway, suggesting manner of proceeding to carry out said arrangement for extension.

4.

BOSTON, *October 18th*, 1873.

J. IRVING PEARCE, Esq.,
Pres't Third National Bank, Chicago, Ill.:

DEAR SIR: The last piece of the Ward paper, or paper with his endorsement, was protested to-day. I should like now to have a little statement of the matter, the date the $40,000 was advanced. I believe the full amount of the notes was not quite due; the bank, figuring the

loan and interest as to the new notes, I suppose should add the interest to the bal'ce due and then make the new notes due 60 days. You will advise me about the rate; I suppose it will be 10%. I will have the notes prepared here, and sent to Detroit for endorsement and forwarded you from there.

Yours, truly,

ELIJAH SMITH.

55

5.

OFFICE OF E. B. WARD,
Detroit, Mich., Oct. 22nd, 1873.

To the THIRD NAT. BANK, *Chicago:*

By arrangement, I have at great trouble and expense obtained the money to pay one-half the notes of the B. & S. W. R. W. with my endorsement, and you propose to insist on the bal. in 60 days. This is all fine, but I don't see how I can meet the am't at that time, and it may be and probably will be impossible to get the bal. at that time.

If you would extend the bal. four (4) months, I have no doubt it can all be paid, and, as times are, it is far better than I can get from any party who owes me.

Please reply to me here.

E. B. WARD, *Pres't.*

6.

THIRD NATIONAL BANK OF CHICAGO,
Chicago, Oct. 23, 1873.

E. B. WARD, Esq., *Detroit:*

DEAR SIR: Yours of the 23rd received. We supposed we were very lenient with you when we agreed to accept ½ the amount of the loan and extend the other ½ $60^{d}|_{d}$. We consented to it rather
56 than have any trouble and it must now be carried out. We had no idea when we made the loan that it would run $60^{d}|_{d}$.

Yours, truly,

L. V. PARSONS, *Cash'r.*

7.

THIRD NATIONAL BANK OF CHICAGO,
Chicago, Oct. 23, 1873.

ELIJAH SMITH, Esq., *Boston:*

DEAR SIR: Yours of the 18th rec'd. We loaned to Wm. Sturges, on call, as follows:

Ap'l 5th, 30,000, int. to Oct. 17	1,625	
" 9th, 10,000, " " " "	530	54
Exch'g' on same	70	
Protest fees	8	12
Tel.	5	
	42,238	66
You paid Oct. 17	19,891	66
	22,347	
Add 10 % int. & disc't $60^{d}|_{d}$	398	03
	22,745	03

Your agreement was to pay ½ the amount and to give us new notes for the balance at 60 d. The payment was not quite half of the amount advanced & int. We were much surprised at not receiving the whole, but must submit we suppose. Would like it, however, if you could pay us the amount due over 20 M & make the new notes that amount.
57 Please have the notes made & forwarded at once. Ward writes us that he fears he shall not be able to meet them & wants them made at 4 mo's, but we will not accept it. There is a matter of $1,000 between Sturgess & the bank which was contingent upon this matter & ought to be included, & which he will explain when he sees you.

Yours, truly,

L. V. PARSONS, *Cash'r.*

8.

[Telegram.]

NEW BEDFORD, MASS., *Oct.* 23.

E. SMITH, *V. Pres't, Boston:*

Ward telegraphs asking if Chicago notes can't be extended four months instead two. Carry ahead further.

S. P. BURT, *Treas.*

9.

BOSTON, *Oct.* 24, 1873.

J. IRVING PEARCE, Esq., *Pres't Third Nat'l Bank, Chicago:*

DEAR SIR: I inclose telegram from the treas'r of the B. & S. W. R. Way Co., asking a little more time on the extended ½ of the notes
58 with the Ward endorsed. While I feel you have done everything that we should ask on the part and realizing your need of the money, I also know the load that Ward has taken in these times in attempting with his other business the completion of the B. & S. W. R. R'd, & I feel like using all my efforts to help him & to ask you to do what you can in addition to what you have already done. If you can't extend the whole 4 months, it would help us if you can, say, 3 notes, 60, 90, & 120 days. Knowing from what you have done in the past you will do all you can, & hoping to hear at once, I am,

Yours truly,

E. SMITH.

10.

THIRD NATIONAL BANK OF CHICAGO,
Chicago, Oct. 28, 1873.

ELIJAH SMITH, Esq., *Boston:*

DEAR SIR: Yours of the 24th rec'd & contents noted. We duly appreciate the spirit of the same and would comply with your request if possible, but we have carried this paper since last April and feel that we have done all that we ought to be asked of, by agreeing to extend ½ for 60 days longer, and especially as we are under no obligations to any one connected with the same to be as lenient as we have been. Our
59 needs are great and we must realize upon it in the shortest possible time. We telegraphed you to-day that we would not extend the time.

Yours truly,

L. V. PARSONS, *Cash'r.*

11.

THIRD NATIONAL BANK OF CHICAGO,
Chicago, Nov. 5th, 1873.

E. B. WARD, Esq., *Detroit:*

DEAR SIR: This bank agreed to accept payment of one-half of the B. & S. W. R. R. Co. notes with your endorsement and extend the other half 60 days if done at once. We have waited now 17 days and the new notes have not yet come to hand. I am instructed by our directors to say that we can wait no longer, and if the notes we hold are not taken up at once we shall enforce their collection.

Yours truly,

L. V. PARSONS, *Cash'r.*

12.

OFFICE OF E. B. WARD,
Detroit, Mich., Nov. 5, 1873.

L. V. PARSONS:

60 D'R SIR: Yours of 5th is rec'd. The notes have been delayed for the purpose of getting at the amount of notes to be made and sent forward. They are now on the way from Boston here & will be forwarded as soon as they arrive.

Resp'y,

E. B. WARD, *Pres't.*

13.

Telegram, November 8th, from Ward to Smith at Boston, inquiring for B. & S. W. notes to be signed.

14.

BOSTON, *Nov. 8th*, 1873.

J. IRVING PEASE, Esq.,
Pres't, Chicago, Ill.:

DEAR SIR: I have sent to E. B. Ward to endorse and forward to you B. & S. W. notes, dated Oct. 17th, @ 60 days.

	10,000	
	5,000	
	6,577 49	
		21,577 49
Say for ½ notes due, 42,400	21,200	
60 days int. & disc't	377 49	
		21,577 59
For the ½ cash due you I deposited at 2nd National Bank here, Oct. 17	19,891 66	
I will deposit Monday	1,154 65	
	21,046 31	

61 Am't due for loan, int., &c., as per your-
statement 42,238 66
½ notes renewed 21,200 00

21,038 66
P'd Oct. 17 ..... 19,891 66

Cash due Oct. 17 to make ½ 1,147 00
Add int. to Nov. 10th 7 65

Which am't I deposit as above stated 1,154 65

I trust this is satisfactory. The delay in forwarding notes was on a/c getting the cash, and I supposed there was no hurry as you would probably hold the notes in your bank. You will please forward the old notes to E. B. Ward unless he instructs you to send elsewhere. I was sorry you could not make the time 4 months. I hope when they mature you will be able to extend at least a portion of them, if it is required.

Yours very truly,

E. SMITH.

15.

OFFICE OF E. B. WARD,
Detroit, Mich., Nov. 10, 1873.

CASHIER THIRD NAT. BANK, *Chicago:*

DEAR SIR: The delay arises from no fault of mine, but is the
62 result of my not being able to obtain a clear statement of my accounts from Boston and New Bedford, the statements received from there being completely "muddled."

Please oblige me by giving me a full statement of the notes, dates and amounts, when due and how much has been paid upon them.

Yours truly,

E. B. WARD,
Her S. R. MUMFORD.

16.

63 17.

OFFICE OF THE WYANDOTTE ROLLING MILL CO.,
Detroit, Nov. 18th, 1873.

CASHIER THIRD NATIONAL BANK, *Chicago, Ill.:*

DEAR SIR: Our attorney, Mr. T. C. Owen, will go to Chicago on Thursday or Friday, and will take with him the renewal notes for Burlington and Southwestern R. R.

Hoping this will be satisfactory,

I remain yours truly,

S. L. POTTER,
For E. B. WARD,
Pres't B. & S. W. R. R.

11.

THIRD NATIONAL BANK OF CHICAGO,
Chicago, Nov. 5th, 1873.

E. B. WARD, Esq., *Detroit:*

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	5,000	
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61	Am't due for loan, int., &c., as per your-statement	42,238 66	
	½ notes renewed	21,200 00	
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	P'd Oct. 17		19,891 66
	Cash due Oct. 17 to make ½		1,147 00
	Add int. to Nov. 10th		7 65
	Which am't I deposit as above stated		1,154 65

I trust this is satisfactory. The delay in forwarding notes was on a/c getting the cash, and I supposed there was no hurry as you would probably hold the notes in your bank. You will please forward the old notes to E. B. Ward unless he instructs you to send elsewhere. I was sorry you could not make the time 4 months. I hope when they mature you will be able to extend at least a portion of them, if it is required.

Yours very truly,

E. SMITH.

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OFFICE OF E. B. WARD,
Detroit, Mich., Nov. 10, 1873.

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E. B. WARD,
Her S. R. MUMFORD.

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OFFICE OF THE WYANDOTTE ROLLING MILL CO.,
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CASHIER THIRD NATIONAL BANK, *Chicago, Ill.:*

DEAR SIR: Our attorney, Mr. T. C. Owen, will go to Chicago on Thursday or Friday, and will take with him the renewal notes for Burlington and Southwestern R. R.

Hoping this will be satisfactory,

I remain yours truly,

S. L. POTTER,
For E. B. WARD,
Pres't B. & S. W. R. R.

18.

THIRD NATIONAL BANK OF CHICAGO,
Chicago, Dec. 11th, 1873.

ELIJAH SMITH, Esq., *Boston:*

DEAR SIR: At the very urgent request of Wm. Sturgis, the stringency of the money market, together with our high regard for you, we were induced to extend the time of payment of one-half of the Burlington & S. W. R. R. paper, endorsed by E. B. Ward, for 60 days on condition that it were done at once. Payment in money of one-half
64 was made, but the paper for the balance has never been received by us. The amount in paper made on 4 mo's time was sent us instead, which has been returned to Mr. Ward & he advised through his attorney that we should expect the 60 day paper to be sent to us as agreed. The 60 days with grace will expire on the 19th, when if payment is not made we shall take such means to collect the notes held by us as we shall deem best. We should be pleased if payment could be made & any legal process be avoided.

Yours, truly,

L. V. PARSONS,
Cash'r.

To the giving in evidence of the letter last aforesaid the defendant duly objected, which objection the court overruled, to which ruling of the court the defendant duly excepted.

19.

BOSTON, *Dec. 23rd*, 1873.

L. V. PARSONS, Esq., *Cash.:*

DEAR SIR: I received your favor of the 11th. I certainly regret very much the delay and annoyance those notes have given and
65 still give to your bank, after the very kind feeling shown by you all through, and disposition to do all you could. I telegraphed you, at Capt. Ward's request, to renew ½ at 60 days, provided ½ was paid cash; and the notes were afterwards made at 60 days and sent out to Ward; that was the last I knew of it. I feel somewhat responsible at your having the paper through Sturgis, but I certainly felt as positive as I could of anything that it would be as sure as anything could be. I have not heard what was the final result, but hope that Ward paid it up and closed up the business. I would have replied sooner to your letter but I sent it to New Bedford to the parties interested in the road in hopes they could bring some influence to bear to have it paid.

Yours, truly,

E. SMITH.

66 This being all the evidence on the part of the plaintiff, the defendant thereupon offered testimony tending to show that the lease of the Burlington and Southwestern Railway Company to Ward was not carried out by the said lessors, and that Ward derived no benefit from said lease. The court ruling that proof tending to show that said lease was not consummated was admissable, but that proof tending to show that said lease if made proved unprofitable would be inadmissable.

Deft then called as a witness one Lillibridge, who testified that he was a clerk for Ward in his lifetime, and during the month of October,

1873, had charge of his letters and correspondence, and in Ward's absence opened, read, and filed away his business letters and mail matter. That he had no recollection of ever receiving any notice of the protest of said notes, and had looked carefully through the files of Capt. Ward's correspondence and could find no such notice.

Thereupon def't offered to prove by said witness that Ward in his lifetime told witness he had never received any notice of the protest of said notes, which testimony was objected to by pl'ff, and the objection sustained by the court, to which def't excepted.

67 Thereupon defendant offered to prove that a certain letter, which he proposed to offer in evidence, was written at the instance of said Ward soon after the maturity of the notes in question, directed to one Burt, and that said Burt sent said letter to the notary who protested said notes, making inquiry in said letter whether any notices of protest had been sent by said notary. And that a certain letter from said notary, which was offered in evidence, was received by said Ward in response thereto. Which testimony and letters so offered were objected to by the plaintiff, and the objection sustained by the court, to which ruling the defendant excepted.

Thereupon, after argument of said cause on behalf of the plaintiff before the jury and argument on behalf of said defendant had commenced, said plaintiff moved the court for leave to file additional counts to the declaration in said cause, to the allowance of which said motion the said defendant then and there objected; which said objection the court overruled, and granted leave to file additional counts, to which said ruling said defendant then and there duly excepted.

68 *Charge to the jury.*

GENTLEMEN OF THE JURY: This suit is presented by the plaintiff in a double aspect, first, against the defendant as executor of Ward on an indorsement by Ward of three promissory notes given by the Burlington and Southwestern Railway Company to the Wyandotte Rolling Mill Company, and by the Rolling Mill Company endorsed, and subsequently endorsed by Ward, claiming that Ward is liable as endorser on these notes; second, for a balance due on a call loan, alleged to have been made by Ward from the plaintiff some time in April, 1873, of $40,000.00, of which 20,000 was paid on the 17th day of October, 1873, and the balance remains unpaid, together with interest thereon.

The plaintiff's testimony tends to prove that at the time of the transaction now in controversy, one Elijah Smith, of Boston, Massachusetts, was the agent and broker of Captain Ward, and that the notes in question and three others, making six in all, drawn by the Burlington and Southwestern Railway Company, payable to the Wyandotte Rolling Mill Company, and by the said company endorsed to Ward, were

69 placed by Ward with his endorsement on them with Smith for the purpose of raising money thereon. That Smith, as Ward's agent, secured the aid and assistance of Mr. William Sturges of this city, and Sturgess obtained a call loan of $40,000 from the plaintiff for Ward, pledging the notes in question as collateral security, and by these means the plaintiff came in possession and became the owner pro tanto of these notes; that Sturgess had no interest in the business, although he endorsed the notes, and the money was remitted directly to Smith, and used by him either to take up other notes of the railway company on which Captain Ward was liable as endorser, or to reimburse Smith for money which he had advanced to take up such notes prior to the receipt of the

money. That about the time these notes fell due Captain Ward and Smith, and other parties interested in the railway company, met at New Bedford, Mass., for the purpose of raising money with which to meet these notes, or rather this loan, and by some arrangement between Ward and certain parties in New Bedford interested in the railway company it was agreed that they would raise for Ward the sum of $100,000, 40,000 of which was to meet this loan and the balance was to be
70 used by Ward to meet certain other liabilities, and the money was accordingly raised.

After this arrangement had been effected, Ward suggested to Smith that an application be made to the plaintiff's bank here to take one-half of this loan when due and extend the balance for 60 days, suggesting that this would enable him (Ward) to use 20,000 of the 40,000 so to be furnished him in other matters where he had great need for money. The plaintiff was telegraphed to and assented to the proposition for an extension, and on the 17th of October the plaintiff was paid $19,891.66, and 3 of the notes taken up, and on the 10th of November the sum of $1,154.65 was paid, which paid one-half the loan and interest on the whole up to the time the extension was granted, namely, the 17th day of October, 1873, so that they treated one-half of the loan as paid Oct. 17th.

The notes in question were made payable at Smith's office in Boston, and about the time of their maturity were forwarded to the Second National Bank of Boston for collection, and the proof tends to show that Ward and Smith knew the notes were held by the Second National Bank, and said Bank was requested by said Smith in behalf of Ward and as Ward's
71 agent not to protest them in view of the fact that an extension had been asked for, and was expected, and by the terms of the extension new notes were to be given; that the Second National Bank, not having any instructions on the subject from the plaintiff here, directed the notes to be protested, and three of the notes were protested, being the notes now in question. The notary who made the protest and demand states that he did not know Ward's place of residence, and therefore inclosed the notice of the dishonor of the notes intended for Captain Ward to the plaintiff here at Chicago, by mail in due time; and there is some testimony tending to show that the notice intended for Ward was in the due course of business duly forwarded by the plaintiff here to Captain Ward by mail from Chicago. The proof on this part of the plaintiff's case, as to the forwarding of this notice to Ward from Chicago, is somewhat incomplete and unsatisfactory, because there is a possibility that it did not get forwarded. The particular clerk or agent whose duty it was to deposit it in the mail, not having been called as a witness, it may be possible, therefore, that it was not
72 mailed; that is, the proof is not certain that it was mailed, or that it got into the hands, actually, of the person whose duty it was to mail it, and if the plaintiff's case depended solely on this point of notice, I should instruct you that it was insufficient to fix Ward's liability as an endorser, but there is also testimony on the part of the plaintiff, as I have already referred to, tending to show that Ward waived this notice of protest. This testimony consists, first, of proof tending to show that Smith, as Ward's agent, requested that the notes should not be protested, but should be held and new notes substituted for them due 60 days thereafter, and that Ward had agreed to have such notes made; second, letters of Ward, after the maturity of the notes, tending to show that he admitted his liability on the notes, and

was asking for information as to the dates and amounts of the new notes to be given.

The plaintiff has also given testimony tending to show that at the time these notes matured Ward was secured; that he held $300,000 of the mortgage bonds of the railroad company, and also as lessee had all the property of the railroad company in his possession and control.

73 Upon this testimony the plaintiff contends, first, that Ward waived notice of protest; secondly, that ample funds having been raised and placed in his hands by the friends of the railroad company to meet these notes, no demand and protest was necessary; the principle being this, that if a maker of a note having obtained a friend to endorse for him, places the endorser in funds to pay the note, then by receiving the fund the endorser becomes bound to apply them in payment of the note, and is not entitled to notice of protest.

You see the rule is based upon obvious principles of equity and justice, because if the endorser has the funds to meet the liability which he has assumed by the endorsement, he is to see that the debt is paid. Third, that being secured by the bonds of the company and the possession of its entire property, no demand and protest was necessary.

The plaintiff further contends that the transaction between itself and Ward through the agency of Smith and Sturgess was a loan, and the notes only taken as collateral security, and that by the whole transaction Ward became the principal debtor, and is liable for the amount due without regard to these notes, the notes being only an incident to the loan.

74 The defendant, on the contrary, contends that Captain Ward's liability was solely that of an accommodation endorser for the railroad company, and that he cannot be held liable unless the proof shows that the necessary steps were taken by the bank to fix his liability by demand and notice in apt time, and denies that anything has been done by Ward waiving demand and notice of protest, or making the same unnecessary. In other words, the defendant denies that he stands in any other relation to these notes than that of a mere accommodation endorser, and that he cannot therefore be held liable unless the plaintiff shows that it has strictly pursued the rules of the commercial law in reference to protest and notice.

Whether Captain Ward, either in person or by his agent, Smith, waived the protest and notice, is a question of fact to be passed upon by you in the light of all the proof in the case. If you find that he waived notice of protest, then none need be shown, and proof that Ward, by letters written after the maturity of the paper, and with knowledge that the notes had not been duly protested, or that
75 he had not received notice of protest, acknowledged or admitted himself liable, may be considered by you as a waiver of demand and notice; the testimony to be all taken together, that is, Ward's letters, and all the other circumstances and proof should be considered, together with the testimony of Mr. Smith as to what transpired at the time the extension was asked for and the new notes promised, together with the letters written subsequently by Ward and by the plaintiff's officers, should all be considered by you to see whether it was the understanding of the parties that these notes were to be taken up and new notes given in their place; and if they were, then no protest was necessary, because the parties waived that by the agreement to take them up and substitute new ones for them.

So if you find from the proof that Ward asked for an extension, and

agreed to give new notes at or about the time the notes in question matured, such agreement may be considered by you as tending to show a waiver of notice. After all, the question of whether notice was waived is a question of fact for the jury, it being understood that the law allows a party to waive notice of protest, the only question being whether he did or not, and that you are to pass upon.

76 So, too, it is for you to say whether the proof shows to your satisfaction that funds to meet this loan or these notes were raised for Captain Ward and he used or diverted them to other purposes; because if you are satisfied from the proof that Ward was put in funds to meet these notes or to meet this loan by the railway company or by those interested in the railway company, then no protest was necessary, and he is liable without proof of demand or protest; and here I will have to suggest to the jury that it is possible in the light of all this evidence that these notices of protest were never sent to Captain Ward. Notices of protest, it will be seen from all the evidence, were mailed in Boston to the Third National Bank in this city during the time, or about the time, that these negotiations for an extension were pending, and the officers of the bank, knowing that the arrangement for the extension and the giving of new notes had been completed by telegraph and a half of the debt had been paid, may have said: "It is of no consequence to send these protests any farther; drop them right here; the matter is at an end." So that it is very possible that, as a matter

77 of fact, Captain Ward never received any notices of protest of these notes; and yet that may be no reason why he should not pay the balance of this debt, in the light of all the testimony in the case.

And further, if the evidence satisfies you that at the time these notes fell due Captain Ward had security for them or held all the property of the maker of the notes in his possession and control, then no demand and notice of protest was necessary, because the object of a notice to the endorser is to give him an opportunity to secure himself from the maker of the note, and if he already has all the property of the maker of the note in his control, then the reason of the rule requiring notice to him is at an end, and the rule therefore is at an end with the reason.

Thus much in regard to the defendant's liability as endorser.

There is, however, another aspect of the case, which I have already alluded to, which may make it unnecessary for you to consider any question in regard to Captain Ward's liability as an endorser. As I have already said, there is proof tending to show that the transactions

78 with the plaintiffs was a direct loan of $40,000 from the plaintiffs to Captain Ward, through the agency of Smith and Sturgess. If you are satisfied from the evidence that this transaction was in fact a loan for the benefit of Captain Ward, or in which he had assumed to be the principal, then he is primarily liable for any amount remaining unpaid. The fact that the plaintiff dealt with Sturges and Smith, or even treated Sturgess as its debtor, makes no difference if the loan was in fact a loan to Ward, nor does it make any difference what became of the proceeds of the notes, whether they were applied to take up Captain Ward's indebtedness or the railroad company's indebtedness, if this was a loan to Ward secured by the pledge of these notes as collateral security; then the collateral cuts no figure in the case, but on the payment of the indebtedness Captain Ward, or Ward's estate, will be entitled to these collaterals, and can take them up and have the benefit of them. So in this case, if you find from the evidence of Sturges, of Smith, and all the testimony taken together, that this was a loan of Captain

79 Ward, with these notes pledged as security; that a half of it has

been paid, and the other half remains unpaid, with interest, then you need take no trouble to enquire into the question of the regularity of these protests, or whether Captain Ward was placed in funds; because that would be a primary liability from Ward to the plaintiffs; that they can sue without reference to the notes.

Sturgess has testified that he was a mere negotiator in the transaction, and Mr. Smith has given evidence tending to show that the loan was wholly for Captain Ward's benefit. This is solely a question of fact to be passed upon by you in the light of all the evidence.

Then, gentlemen of the jury, to conclude, if you are satisfied that Ward was placed in funds for the payment of these notes, either by the railroad company or by the parties interested in the railroad company, then he is liable. If you find that he waived the demand and protest, or notice of protest, then he is liable as endorser. And further, if you find, as I have already said, that this was an original loan to Ward,
and upon his credit, with these notes pledged as collateral, then
80 he is liable as an original debtor.

In the event that you find him liable only as an endorser, then the measure of damages will be the amount of the notes, with six per cent. interest from the time they respectively fell due. If, on the contrary, you find that this was a loan of money, as stated by some of plaintiff's witnesses, at ten per cent. interest, and that the interest has been paid up to the 17th of October, 1873, and one-half the principal paid at that time, then the measure of damages will be the balance remaining unpaid, $20,000, and interest at ten per cent. on that from the 17th of October, 1873, up to this time.

If you find neither of these facts are made out, of course your verdict will be for the defendant.

You will please say in your verdict whether you find this to be an original loan, or find the defendant liable as an endorser.

To the following portions and each of them of said charge the said defendant duly excepted, to wit:

1. To that part of said charge wherein the court charged as follows:

1. That the evidence tends to prove that Elijah Smith was the
81 agent and broker of Capt. Ward, and that the notes in question and three others were placed by Ward, with his endorsement on them, with Smith, for the purpose of raising money thereon. That Smith, as Ward's agent, secured the aid and assistance of Sturgess, and Sturgess obtained a call loan of $40,000 from the plaintiff for Ward.

To that part of said charge wherein the court charged as follows:

"2. That about the time these notes became due Ward and Smith and other parties interested with the railway company met at New Bedford for the purpose of raising money with which to meet these notes, or, rather, this loan, and by some arrangement between Ward and certain parties interested in the railway company, it was agreed they would raise for Ward one hundred thousand dollars, forty thousand dollars of which was to meet this loan, and the balance was to be used by Ward to meet certain other liabilities, and the money was accordingly raised; and that after the arrangement had been effected Ward suggested
to Smith an application to the bank to take one-half this loan
82 when due, and extend the balance for sixty days, suggesting that this would enable him, Ward, to use $20,000 of the $40,000 in other matters where he had great need for money."

3. To that part of said charge wherein the court charged as follows:

"That the testimony tends to show that at the time these notes matured

Ward was secured; that he held $300,000 of the mortgage bonds of the railway company, and also, as lessee, had all the property of the railroad company in his possession and control."

4. To that part of said charge wherein the court charged as follows: "That there is proof tending to show that the transactions with the plaintiff were a direct loan of $40,000 from the plaintiff to Ward through the agency of Smith and Sturgess."

To the said first proposition, because it is misleading, and because the evidence does not tend to show that said Smith, as Ward's agent, secured the aid of Sturgess, nor that Sturgiss obtained the loan for Ward.

To the said second proposition, because it improperly assumes the full sum of $100,000 was raised.

83 And also because it improperly assumes that the proposition of Ward to extend one-half the loan 60 days was made after the arrangement to raise said sum had been effected.

To the said third proposition, because the same is misleading, and also because said proposition is not supported by the evidence.

To the said fourth proposition, because the same is not supported by the evidence.

Inasmuch as the matters and things aforesaid do not appear of record in said cause, the said defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the court, and thereby made a part of the record in said cause.

And it is done accordingly.

H. W. BLODGETT, [SEAL.]
Judge.

(Endorsed:) Filed July 26, 1877. Wm. H. Bradley, clerk.

84 Afterwards, to wit, on the 27th day of August, A. D. 1877, said defendant filed in said clerk's office his bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

THE THIRD NATIONAL BANK OF CHICAGO
vs.
ORRIN W. POTTER AS SOLE EXECUTOR OF THE estate of Eber B. Ward, deceased.

Know all men by these presents that we, Orrin W. Potter, as sole executor of the estate of Eber B. Ward, deceased, as principal, and Stephen Clement, as surety, of the county of Cook, in the State of Illinois, are held and firmly bound unto The Third National Bank of Chicago, in the county and State aforesaid, in the sum of five hundred dollars, to be paid to the said Third National Bank, its successors or assigns, to which payment, well and truly to be made, we, the said Orrin W. Potter as executor as aforesaid, and Stephen Clement as surety, bind ourselves and each of us, jointly and severally and respectively, our

85 and each of our successors, heirs, executors, and administrators, firmly by these presents, sealed with our seals this day of August, A. D. 1877.

Whereas the above-named Orrin W. Potter, as sole executor of the estate of Eber B. Ward, deceased, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered

in the above-entitled action by the circuit court of the United States for the northern district of Illinois: Now therefore the condition of this obligation is such, that if the above-named Orrin W. Potter, as executor as aforesaid, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

ORRIN W. POTTER, [SEAL.]
As Executor of the Estate of Eber B. Ward.
STEPHEN CLEMENT. [SEAL.]

Approved.

H. W. BLODGETT,
Judge.

(Endorsed:) Filed August 27th, 1877. W. H. Bradley, clerk.

86 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein The Third National Bank of Chicago is the plaintiff and Orrin W. Potter, executor of Eber B. Ward, deceased, is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 9th day of October, A. D. 1877, and of our Independence the one hundred and second year.

WM. H. BRADLEY,
Clerk.

87 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between The Third National Bank of Chicago, plaintiff, and Orrin W. Potter, as executor of the last will and testament of Eber B. Ward, deceased, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Orrin W. Potter, as executor aforesaid, as by his complaint appears, and it *is* being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1877, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of August, in the

year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 102nd year.

[SEAL.] WM. H. BRADLEY,
Clerk.

(Indorsed:) Supreme Court of the United States. Eber B. Ward, executor &c vs. Third National Bank of Chicago. Writ of error.

88 UNITED STATES OF AMERICA, *ss:*

To the Third National Bank of Chicago, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Orrin W. Potter, as sole executor of the estate of Eber B. Ward, deceased, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 27th day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

H. W. BLODGETT,
Dist. Judge.

89 Received copy of within citation.
Chicago, September 3d, 1877.

JOHN H. THOMPSON,
Att'y of Third National Bank of Chicago.

90 Supreme Court of the United States, of October term, A. D. 1877.

ORRIN W. POTTER, EXECUTOR OF THE ESTATE of Eber B. Ward, deceased, plaintiff in error,
vs.
THE THIRD NATIONAL BANK OF CHICAGO, defendant in error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Orrin W. Potter, by George Willard, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The said circuit court erred in overruling the objection interposed by the plaintiff in error to the giving of evidence as to the course of business of the defendant in error respecting the forwarding of
91 letters by mail.

2. The said circuit court erred in overruling the objection interposed by the plaintiff in error to the question asked the witness Sturgis.

3. The said circuit court erred in overruling the objection interposed by the plaintiff in error to the giving in evidence the letter dated December 11th, 1873, from L. V. Parsons, cashier, to Elijah Smith.

4. The said circuit court erred in sustaining the objections, and each of them, interposed by the defendant in error to the proof offered on behalf of the plaintiff in error as to what Ward, in his lifetime, said re-

specting the question of non-receipt of notices of protest of said notes, and also sustaining the objection interposed by the defendant in error to the giving in evidence the letter written by said Ward, and response received thereto respecting the same question.

92 5. The said circuit court erred in giving those portions, and each of those portions, of the charge to the jury which were excepted to by the plaintiff in error.

And the said Orrin W. Potter prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that he, as executor as aforesaid, may be restored to all things which he hath lost as such executor by occasion of the said judgment.

GEO. WILLARD,
Attorney for Plaintiff in Error.

(Indorsed:) Supreme Court of the United States. Third National Bank of Chicago vs. Orrin W. Potter, executor, etc. Citation.

(Indorsement on cover:) No. 304. Orrin W. Potter, ex'c'r of Eber B. Ward, dec'd, plaintiff in error, vs. The Third National Bank of Chicago. N. Illinois C. C. U. S. Filed 15th October, 1877.

REC. 304—3

OFFICE SUPREME COURT U. S.
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

ORRIN W. POTTER, Executor, &c. of
EBER B. WARD, Deceased,
Plaintiff in Error.

v.

THE THIRD NATIONAL BANK OF CHICAGO,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT OF GEO. WILLARD,

FOR PLAINTIFF IN ERROR.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1880.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

ORRIN W. POTTER, Executor, &c. of EBER B. WARD, deceased,
Plaintiff in Error.

v.

THE THIRD NATIONAL BANK of CHICAGO,
Defendant in Error.

In Error to the Circuit Court of the United States, for the Northern District of Illinois.

STATEMENT OF THE CASE.

This suit was instituted in the court below April 28, 1874, by the defendant in error, against Eber B. Ward, in his life-time.

In the original declaration filed June 26, 1874, the principal grounds of recovery alleged against Ward, were three in number, namely:

(1.) As second endorser of three certain promissory notes, copies of which are as follows:

$8,000. BURLINGTON, IOWA, April 7, 1873.

Six months after date, the Burlington and South Western R'y Co. promise to pay to the order of the Wyandotte Rolling Mill Co., eight thousand dollars, at office of Elijah Smith, No. 12 Sears Building, Boston, Mass. Value received.

THE BURLINGTON AND SOUTH WESTERN R'Y CO.,
By HENRY HATCH, *Trea.*

$8,000. BURLINGTON, IOWA, APRIL 11, 1873.

Six months after date, the Burlington and South Western R'y Co. promise to pay to order of Wyandotte Rolling

Mill Co., eight thousand dollars, at office of Elijah Smith, No. 12 Sears Building, Boston, Mass. Value received.

THE BURLINGTON AND SOUTH WESTERN R'Y CO.,
By HENRY HATCH, *Trea.*

$6,508.34. BURLINGTON, IOWA, April 16, 1873.

Six months after date, the Burlington & South Western R'y Co. promise to pay to the order of the Wyandotte Rolling Mill Company, sixty-five hundred and eight $\frac{34}{100}$ dollars, at office of Elijah Smith, No. 12 Sears Building, Boston Mass. Value received.

THE BURLINGTON & SOUTH WESTERN R'Y CO.,
By HENRY HATCH, *Trea.*

(2.) As a debtor to the defendant in error, for money loaned to Ward at his special instance and request; and,

(3.) As a debtor to the defendant in error, for money had and received.

A plea of the general issue was filed November 17, 1873, accompanied by a stipulation, providing, in substance, that special matters of defense might be proven under that plea.

On March 22, 1875, on suggestion of Ward's death, his executors were substituted as defendants, and afterwards, on May 16, 1877, on suggestion of the resignation of certain of the executors, the suit was dismissed as to all except Orrin W. Potter, now the plaintiff in error.

In the original declaration, it was averred that Ward's liability as endorser became fixed and absolute, by reason of protest for non-payment of said notes, and due notice, thereof to him, but after the evidence was all in at the trial, and during the closing arguments to the jury, the court, on motion, and against objection, allowed additional counts to be filed, wherein it was alleged that Ward had waived notice. No issue was formed under those additional counts. Indeed, it does not appear that they were filed before the trial was concluded, and the verdict rendered.

A verdict was rendered May 18, 1877, for the defendant

in error, for $27,166.66. A motion for a new trial was overruled, and on the 26th day of July, 1877, a judgment was entered on the verdict, and execution awarded, to be paid in the due course of administration.

The testimony introduced at the trial disclosed such an uncertainty as to the real facts in the case, as to bring the question of recovery pre-eminently within the province of the jury, and made the rulings of the court upon the evidence, and the charge of the court to the jury, of vital importance to the parties.

The questions which were the most seriously contested below, and which are involved in the points assigned for error are as follows :

1. Whether Ward was duly notified of non-payment and protest—that question depending upon the further question, whether the defendant in error, upon the supposed receipt of the notices from the notary at Boston, mailed them at Chicago addressed to Ward at Detroit.

2. Whether Ward had waived notice of protest—that question depending upon further questions, namely (1.) In what capacity, if any, in October, 1873, did Ward cause application to be made to the defendant in error to accept half of the loan and extend the balance sixty days? Was it in his individual capacity, or as president of the railway company, or as president of the rolling mill company, that he made the request, if at all? (2.) Was Ward possessed of such security by way of pledge, or by reason of his being lessee of the railway, its rights, franchises and property, as deprived him of all right to notice of protest ?

3. Was the supposed loan by the defendant in error in April, 1873, made to Ward at his instance and request through the agency of Smith and Sturges? that question depending upon further questions, namely (1.) In what capacity, if any, did Smith secure the aid of Sturges to

effect a loan? Was it in his individual capacity, or as president, agent and broker of the railway company, or as agent and broker for the rolling mill company, or as agent and broker for Ward? (2.) In what capacity did Sturges act in that regard? Was it in his individual capacity, or as agent for another?

4. Did Ward (as regards the defendant in error) misapply any portion of the funds raised for him in New Bedford? That question depending upon further questions, namely (1.) What was the amount raised? (2.) Was the defendant in error wrongfully induced to extend payment of half the loan sixty days?

The questions of fact are pertinent because of their relation to certain portions of the charge assigned for error.

The rulings of the court and such portions of the charge as are assigned for error depend for their correctness very largely upon the tendency of the proof upon a variety of subjects. And to succinctly and intelligently show the manner in which the questions are raised, seems to require a *brief connected statement* of what the evidence tended to prove.

The evidence tended to prove that the Wyandotte Rolling Mill Company of Michigan, E. B. Ward, president, residing at Detroit, contracted to sell to the Burlington & South Western Railway Company, of Iowa, 2,500 tons of iron rails, for $225,000; for which amount the railway company were to execute its notes, payable to the rolling mill company. That Ward would endorse the notes as president and individually, and sell or pledge them, and that if the railway company were unable to pay them at maturity, then the same should be renewed.

That one Elijah Smith of Boston was the agent and broker of Ward, and of the rolling mill company, and of the railway company in the matter of negotiating paper for them respectively.

That in the month of April, 1873, said Smith, who was then the president of the railway company, sought, at the instance of Ward, to make a loan of $40,000, for the purpose of taking up certain of said series, (viz: the first renewal series) of notes, which had then matured, or were about maturing, upon the notes in question, and others of the same character, as collateral security.

That one William Sturges suggested to Smith that the loan could be made of the defendant in error. That at the request of Smith, Sturges took the notes in question from Boston to Chicago, and applied for the loan, and the defendant made the same on call, taking said notes and three others of similar amount, all indorsed by Sturges, as collateral security.

That about the time the notes in question fell due, Ward was the president, and Smith the vice president, of the railway company. That they and others, who, as stock and bond holders, were interested in the railway company, met at New Bedford, and tried to raise the sum of $100,000, for the purpose of meeting certain liabilities, which Ward had incurred, as indorser for said railway company, including the debt due to the defendant in error.

That after their purpose was accomplished as fully as possible, Smith, acting on Ward's suggestion, applied to the defendant in error to accept half the amount of its loan, and extend the balance sixty days, so as to enable Ward to use $20,000 of the funds to meet other obligations, where he was indorser for the railway company. That the defendant in error, with the consent of Sturges, agreed to an extension, and on October 17, 1873, received one-half the amount of the loan, and surrendered one-half the collaterals, retaining only the notes in question.

That the notes were duly protested at Boston, and notices to the endorsers mailed to the defendant in error at Chicago.

Assignment of Errors.

The plaintiff in error assigns the following matters, and each of them, for error:

1. The Circuit Court erred in overruling the objection interposed by the plaintiff in error to evidence, that in the due course of the business in the office of the defendant in error, notices of protest would have been forwarded by mail to Ward if they had been received from the notary. (p. 17 printed Record.)

2. The Circuit Court erred in overruling the objection interposed by the plaintiff in error to the question asked the witness, Sturges. (p. 18 printed Record.)

3. The Circuit Court erred in overruling the objection interposed by the plaintiff in error to the giving in evidence of the letter of Parsons, cashier, to Smith, dated Dec. 11th, 1873. (p. 24 printed Record.)

4. The Circuit Court erred in sustaining the objection interposed by the defendant in error to proof offered that Ward had stated in his lifetime, that he had never received any notices of protest of said notes. (p. 25, printed Record.)

5. The Circuit Court erred in sustaining the objection interposed by the defendant in error to the introduction in evidence of two letters, one being a letter written at the instance of Ward soon after the maturity of the notes in question, making inquiry whether any notices of protest had been sent by the notary, and the other being the notary's reply thereto. (p. 25, printed record.)

6. The Circuit Court erred in charging the jury as follows:

"That the evidence tends to prove that Elijah Smith was the agent and broker of Capt. Ward, and that the notes in question, and three others, were placed by Ward, with his indorsement on them, with Smith, for the purpose of

raising money thereon. That Smith, as Ward's agent, secured the aid and assistance of Sturges, and Sturges obtained a call loan of $40,000 from the plaintiff for Ward." (p. 29, printed Record.)

7. The Circuit Court erred in charging the jury as follows:

"That about the time these notes became due, Ward and Smith, and other parties interested with the railway company, met at New Bedford for the purpose of raising money with which to meet these notes, or rather this loan, and by some arrangement between Ward and certain parties interested in the railway company, it was agreed that they would raise for Ward $100,000, $40,000 of which was to meet this loan, and the balance was to be used by Ward to meet certain other liabilities, and the money was accordingly raised, and that after the arrangement had been effected, Ward suggested to Smith an application to the bank to take one-half this loan when due, and extend the balance for sixty days, suggesting that this would enable him, Ward, to use $20,000 of the $40,000 in other matters where he had great need of money." (p. 29, printed Record.)

8. The Circuit Court erred in charging the jury as follows:

"That the testimony tends to show that at the time these notes matured, Ward was secured; that he held $300,000 of the mortgage bonds of the railway company, and also, as lessee, had all the property of the railroad company in his possession and control." (pp. 29, 30, printed Record.)

9. The Circuit Court erred in charging the jury as follows:

"That there is proof tending to show that the transactions with the plaintiff were a direct loan from the plaintiff to Ward through the agency of Smith and Sturges." (p. 30, printed Record.)

10. The Circuit Court erred in awarding execution upon the judgment rendered against the plaintiff in error. (p. 16, printed Record.)

BRIEF OF THE ARGUMENT.

I.

THE CIRCUIT COURT ERRED IN OVERRULING THE OBJECTION INTERPOSED BY THE PLAINTIFF IN ERROR TO EVIDENCE THAT IN THE DUE COURSE OF THE BUSINESS IN THE OFFICE OF THE DEFENDANT IN ERROR, NOTICES OF PROTEST WOULD HAVE BEEN FORWARDED BY MAIL TO WARD, IF THEY HAD BEEN RECEIVED FROM THE NOTARY.

The notices of protest were supposed to have been sent by the notary at Boston to the defendant in error at Chicago. If, as a matter of fact, they were thus sent and were received by the defendant in error, the only evidence offered showing that they were duly forwarded to Ward at Detroit, was that in the due course of the business of the office, it would have been done. (p. 17, printed Record.)

Such evidence was insufficient.

Hetherington v. *Kemp*, 4 Camp., 193.
Hawkes v. *Salter*, 4 Bing., 715.
Toosey v. *Williams*, 1 Moody & M., 129.
The Com'l Bank of Albany v. *Strong*, 28 Vt., 316.

By admitting this testimony, the jury were given an opportunity to arrive at the conclusion that the notices were duly forwarded, whereas such a conclusion would have no proper support in the evidence.

II.

THE CIRCUIT COURT ERRED IN OVERRULING THE OBJECTION INTERPOSED BY THE PLAINTIFF IN ERROR TO THE QUESTION ASKED THE WITNESS STURGES.

The question was whether, after making the supposed loan, the witness had any interview or conversation with

Ward with reference to the notes in question. The objection was upon the ground that Ward was dead, and the witness interested in the result of the suit. (Page 18, Printed Record.)

Rules of evidence prescribed by the laws of a State are the rules of decision for the Federal Courts, while sitting within the limits of such State.

Wright v. *Bales*, 2 Black, 535.
Ryan v. *Bindley*, 1 Wall., 66.
Sec. 858, Rev. Stat. U. S.

Rules of evidence applicable to the question thus put to the witness had been prescribed by law in the State of Illinois, and were then in force. Sections 1 and 2 of chapter 51, entitled "Evidence and Depositions," Rev. Stat. Ill. 1874, p. 488, being as follows:

"§ 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: That no person shall be disqualified as a witness in any civil action, suit or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party, or otherwise, or by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such witness, and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto,) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence."

"§ 2. No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section; when any adverse party sues or defends, as the trustee or conservator of any idiot, habitual drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:

"*First.* In any such action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee or devisee, shall have attained his or her majority.

"*Second.* When in such action, suit or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party, or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction.

"*Third.* Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction.

"*Fourth.* Where, in any such action, suit or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation.

"*Fifth.* When, in any such action, suit or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition, by such deceased person, and not excluded for irrelevancy or incompetency."

These provisions are not in conflict with the statute of the United States—Sec. 858 above cited.

These exceptions or limitations to the right of parties or interested persons to testify were made by the State for the purpose of securing to litigants mutuality of benefit and advantage, and upon that ground they have been firmly upheld by the State Supreme Court.

Boynton v. *Phelps et al.*, 52 Ill., 210.

Merrill v. *Aiken*, 59 *id.*, 19.

Whitmer v. *Rutter et al., Ex'rs*, 71 *id.*, 410.
Stone v. *Cook*, 79 *id.*, 424.
Langley v. *Dodsworth, Ex'rx*, 81 *id.*, 86.

Sturges was an interested witness. He was an indorser whose liability had become fixed and absolute by reason of the notice which he acknowledged to have received of non-payment and protest. He, also, as the evidence tends to show, was the person to whom the supposed loan was made. The letter dated October 23, 1873, written by the defendant in error, asserts that the loan was to Sturges. (p. 20 printed record.)

As a witness, Sturges was not called by the court, nor by the plaintiff in error.

Ward was dead, and the plaintiff in error was defending, as executor of his last will and testament. The question asked the witness related to interviews or conversations with Ward regarding the subject matter of the trial.

The question, therefore, having no support in the laws of the United States, and being clearly obnoxious to the rules of evidence as prescribed by the laws of the State, the objection should have been sustained and not overruled.

In reply to the question the witness stated in substance that he met Ward in the city of Detroit on the 4th day of July, 1873, and there had a conversation with him, in which the witness informed him that he (the witness) had got the money of the plaintiff for Smith and him (Ward), at which Ward seemed gratified, and asked witness if he (witness) could not probably carry it along awhile for him, to which witness replied he thought likely he could.

The effect which the answer tended to have upon the result of the trial was of exceeding importance to the parties; and it gave the defendant in error an advantage over the executor which the latter could not overcome.

The injustice of placing litigating parties in such a situation is forcibly portrayed in the opinion of the State Supreme Court in *Boynton* v. *Phelps*, 52 Ill., where, on page 219, BREESE, Chief Justice, speaking for the court, uses language as follows:

"The second section of the act of 1867 clearly contemplates that the parties to a suit, when one of them is offered as a witness as against the other, shall occupy equal grounds; that both shall be present in the flesh, or have the power to be present. If it were not so, the greatest injustice would be the result. A swift and willing living witness would have the whole case in his own power, and a door to perjury would be opened so wide and so inviting as to require great moral firmness to decline an entrance into it. It would be a temptation very many would not be able to resist."

III.

THE CIRCUIT COURT ERRED IN OVERRULING THE OBJECTION INTERPOSED BY THE PLAINTIFF IN ERROR TO THE GIVING IN EVIDENCE OF THE LETTER OF PARSONS, CASHIER, TO SMITH, DATED DECEMBER 11TH, 1873.

The objection is that the letter was an uncalled-for declaration by the defendant in error in its own interest. (p. 24 printed record.

If it was competent evidence it must have been upon the ground that it was a part of the *res gestae*.

IV.

THE CIRCUIT COURT ERRED IN SUSTAINING THE OBJECTION INTERPOSED BY THE DEFENDANT IN ERROR TO THE PROOF OFFERED THAT WARD HAD STATED IN HIS LIFE-TIME THAT HE HAD NEVER RECEIVED ANY NOTICE OF PROTEST OF SAID NOTES.

No ground for the objection having been stated, let the inquiry be upon the question of admissibility of the evidence.

It appears that one Lillibridge had been called as a witness, and testified that during the month of October, 1873, he had charge of Ward's letters and correspondence, and in Ward's absence opened, read and filed away his business letters and mail matter. That he (the witness) did not know of the receipt of any notices of protest of the notes in question, and that he had carefully searched through the files of Ward's office and could not find any such notices.

The plaintiff in error then offered to prove by the witness that Ward in his life-time had told him that he (Ward) had never received any notice of protest of said notes. (p. 24 printed record.)

Lillibridge's testimony as far as given, tended to rebut any presumption which might arise from the testimony on the part of the defendant in error, that notices of protest of these notes had been mailed at Chicago, addressed to Ward, at Detroit.

The testimony thus offered, objected to and ruled out, would, if received, have had the same tendency, because if these notices had been put into the Post Office, at Chicago, addressed to Ward, at Detroit, the presumption would be, that they were received accordingly.

Munn v. *Baldwin*, 6 Mass., 316.

Testimony, therefore, tending to show non-receipt would have tended to rebut any presumption that the notices had been mailed.

The testimony offered formed a part of the *res gestae* of the principal fact of mailing, and therefore was competent.

In *Beaver* v. *Taylor*, 1 Wall., 637, and again in *Insur-*

ance Company v. *Mosley*, 8 Wall., 397, this Court considered the doctrine of *res gestae*, and upon authority of those cases, and upon authority of the ruling of the Circuit Court, in the principal case, admitting the letter written on behalf of the defendant in error, dated Dec. 11th, 1873, referred to on page of this brief, it was competent to prove what the decedent said in his lifetime upon the question of receipt of the notices.

In *Beaver* v. *Taylor*, *supra*, the principal fact was, whether certain taxes had been paid by certain persons whose interest it was to pay them, and it was held that certain letters written by their agent to them, and a certain account kept by them with the agent, all tending to show payment, were competent, as forming a part of the *res gestae*.

In *Insurance Company* v. *Mosley*, *supra*, the principal fact was, whether the insured died from injuries caused from an accidental fall down stairs, or from natural causes, and it was held that the declaration of the deceased made to his wife and son, that "he had fallen down stairs and "almost killed himself," was admissible as part of the *res gestae*, although made several days after the accident. The court said, p. 407:

"To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate; but this rule is by no means of universal application."

The court cited with approbation the case of *Rawson* v. *Haigh*, 2 Bingham, 99, where the question was, whether an act of bankruptcy had been committed. The question depending upon the intent by which the debtor was actuated in quitting England, a letter written by him a month after his departure was held admissible, as forming a part of the whole *res gestae*.

V.

THE CIRCUIT COURT ERRED IN SUSTAINING THE OBJECTION INTERPOSED BY THE DEFENDANT IN ERROR TO THE INTRODUCTION IN EVIDENCE OF TWO LETTERS: ONE BEING A LETTER WRITTEN AT THE INSTANCE OF WARD SOON AFTER THE MATURITY OF THE NOTES IN QUESTION, MAKING INQUIRY WHETHER ANY NOTICES OF PROTEST HAD BEEN SENT BY THE NOTARY, AND THE OTHER BEING THE NOTARY'S REPLY THERETO.

The questions arising upon this point are substantially the same as those arising upon the point last considered, and may properly be determined from the same rules of evidence.

VI.

THE CIRCUIT COURT ERRED IN CHARGING THE JURY AS FOLLOWS:

"That the evidence tends to prove that Elijah Smith was the agent and broker of Capt. Ward, and that the notes in question, and three others were placed by Ward with his indorsement on them with Smith, for the purpose of raising money thereon. That Smith, as Ward's agent, secured the aid and assistance of Sturges, and Sturges obtained a call loan of $40,000 from the plaintiff for Ward."

The exception to this part of the charge was (1) that it was misleading; (2) that the evidence did not tend to show that Smith, as Ward's agent, secured the aid of Sturges, and (3) that the evidence did not tend to show that Sturges obtained the loan for Ward.

In *United States* v. *Brietling*, 20 How., 252, this court decided that it was clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The court say (p. 255,) as follows:

" The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

To the same effect are:

Mich. Bank v. *Eldred*, 9 Wall., 544. (See p. 553.)
Lucas v. *Brooks*, 18 Wall., 436.
Hall v. *Weare*, 2 Otto, 728.
Railroad Co. v. *Houston*, 5 Otto, 697.

An instruction or charge which separates the affirmative from the negative evidence, and calls the attention of the jury to the former, and makes no reference to the latter upon any given question, is equally misleading, unjust and erroneous.

In *Hatch et al.* v. *Marsh*, 71 Ill., 370, the Supreme Court of Illinois say (p. 374): " In doubtful cases the judge, by instructions, should not single out isolated portions of the evidence, and tell the jury to consider them. All the evidence admitted is for the consideration of the jury, and the practice should not be encouraged in making detached portions prominent."

In the principal case that portion of the charge now in question is not in consonance with the rules thus laid down.

The court therein called the attention of the jury to the fact that the proof tended to show:

1. " That at the time of the transaction in controversy, " (April, 1873,) Smith was the agent and broker of " Ward."

That was true, but it likewise tended to show *that he was also the agent and broker of the rolling mill com-*

pany, and the president, agent and broker of the railway company.

2. " That the notes in question, and three others, were " placed by Ward, with his indorsement on them, with " Smith."

That is true, but the notes, being "second renewals," *belonged to the railway company, and not to Ward.*

3. " For the purpose of raising money thereon."

That is true, but the money which was to be raised thereon was to enable *the railway company to pay its debts*, and not for Ward's use.

4. "*That Smith, as Ward's agent*, secured the aid and " assistance of Sturges."

The evidence tended, in an equal or greater degree, to prove that Smith, as *president, agent and broker of the railway company, or as agent and broker of the rolling mill company*, secured the aid and assistance of Sturges.

5. " And Sturges obtained a call loan of $40,000 from the " plaintiff for Ward."

The evidence tended, in an equal or greater degree, to show that Sturges obtained the loan for *himself, or for Smith, or for the railway company, or for the rolling mill company.*

Sturges, it will be remembered, endorsed the notes and delivered them to the defendant in error, and the letter of Parsons, cashier, dated Oct. 23d, 1873, (page 20, printed record,) shows the loan *was to Sturges.* And Smith being the highest executive officer of the railway company, and its agent and broker, had apparently as much reason to borrow money on his own personal account to pay the railway company's debts, as Ward had to have it borrowed on his own account for that purpose. And so had the rolling mill company.

Again, the fact that Smith was the agent and broker for Ward in the matter of negotiating paper for him, would not authorize Smith as *such* agent to borrow money on railway company property to pay railway company debts, except upon Ward's *special instance and request.*

It is true the testimony tended to show that Smith, at Ward's instance, sought to make a loan with which to pay the railway company's maturing paper, but it may safely be asserted that that of itself was not sufficient authority for doing so on Ward's private account.

By separating the affirmative from the negative evidence, and calling the attention of the jury to the former and omitting all mention of the latter, the charge became highly prejudicial to the plaintiff in error, in that it must have had a strong tendency to mislead the jurors.

A little reflection will show sufficient doubt about the liability of the plaintiff in error to require a charge less unfavorable to him.

From the bill of exceptions, which purports to show all the testimony, it is apparent that under the contract for the purchase and sale of the iron it was the absolute and unqualified duty of the railway company to prevent the notes, whether originals or renewals, from going to protest.

That if the railway company were able to pay them at maturity it was their duty to do so.

That if the railway company were unable to pay them at maturity, then it was their absolute and unqualified duty to cancel them with the proceeds of sale or hypothecation of renewal notes which, under the contract, the company had the right to execute and have endorsed by the rolling mill company and by Ward, as before, and so on repeatedly.

That except upon protest for non-payment and notice thereof, neither the rolling mill company nor Ward were

under any obligation whatever to pay the notes or to do anything respecting them except to endorse renewal notes when necessary.

That in April, 1873, when the notes matured or were about maturing, to take up which the notes in question were sold or hypothecated to the defendant in error, Smith was the president of the railway company, as well as its agent and broker in the matter of negotiating its paper. (p. 17 printed record, marginal p. 49.)

That, being its president, agent and broker, Smith had full power, and manifestly it was his duty to perform on behalf of the company its obligation to take up and cancel the matured and maturing notes.

That to better enable him to perform that obligation he had provided himself with renewal notes, viz., the notes in question.

That there was no occasion for Smith to lay aside his power and disregard his obligation to act for the railway company in the matter of taking up and canceling those notes.

That there was no occasion for Ward to ask or expect Smith to borrow money for him, Ward, with which to pay those notes.

That there is no evidence tending to show that any part of the money obtained on the notes in question was paid to Ward, or for his use.

With these suggestions it is submitted that the claim that Smith was authorized by Ward to, and did, borrow this money for Ward's personal account, is, to say the least, a very extraordinary one, and should not be allowed except upon a fair trial, and upon clear and convincing proof of an absolute and unqualified direction by Ward to Smith, not only to borrow the money, but to borrow it on his, Ward's, personal account.

VII.

THE CIRCUIT COURT ERRED IN CHARGING THE JURY AS FOLLOWS:

"That about the time these notes became due, Ward and Smith, and other parties interested with the railway company, met at New Bedford for the purpose of raising money with which to meet these notes, or rather this loan, and by some arrangement between Ward and certain parties interested in the railway company, it was agreed they would raise for Ward $100,000, $40,000 of which was to meet this loan, and the balance was to be used by Ward to meet certain other liabilities, and the money was accordingly raised; and that after the arrangement had been effected, Ward suggested to Smith an application to the bank to take one-half this loan when due, and extend the balance for sixty days, suggesting that this would enable him, Ward, to use $20,000 of the $40,000 in other matters where he had great need of money."

The exception to this portion of the charge was substantially that it improperly assumed that the full sum of $100,000 was raised.

The question, whether or not the full sum was raised, was an exceedingly doubtful one, and important withal, because if the full sum was obtained, the inference would be that the defendant in error should or might have been wholly paid, whereas, if it was not all obtained, the inference would be that it was proper and right to apportion the amount equally between those for whom it was intended.

This bears upon the third ground of action alleged in the declaration, the gist of which is that Ward misapplied $20,000 obtained for the use and benefit of the defendant in error.

Smith's letter, dated October 11th (page 19) and Ward's letter, dated October 22 (page 20, printed record) show that money enough to pay the whole debt due the defendant in error *was not raised.*

The court, by informing the jury that "*the money was* "*accordingly raised, and that, after the arrangement had* "*been effected*, Ward suggested," &c., not only did not aid the jury in coming to a correct conclusion upon that question, but on the contrary, it tended to embarrass and mislead them to the prejudice of the plaintiff in error.

The bill of exceptions shows that at the time of the meeting at New Bedford, Ward was president, and Smith vice-president of the railway company (page 18, printed record), and their actions at that time should have been considered in view of that fact, and also in view of the fact that Ward was president of the rolling mill company. It is clear that the interests of those two companies was as great in the matter of paying the notes, as was Ward's individually. Naturally considered, their strongest motive was to raise the money on railway account for use in paying railway debts.

Again, the most natural inference to be drawn from the language of the charge is, that Ward wanted to use $20,000 of the fund in his private matters, whereas the evidence tended only to show that he wanted that amount to use "*to meet other obligations where he was liable as en-* "*dorser for said railway company.*" (p. 18, printed record, marginal page 50.)

These facts should have been incorporated in this portion of the charge, but their omission was unimportant, compared with the assumption that the full sum of $100,000 was raised.

VIII.

THE CIRCUIT COURT ERRED IN CHARGING THE JURY AS FOLLOWS:

"That the testimony tends to show that at the time these notes matured Ward was secured; that he held

$300,000 of the mortgage bonds of the railway company, and also as lessee had all the property of the railroad company in his possession and control."

The exception to this portion of the charge was that it is misleading, and also that it is not supported by the evidence.

The evidence tended to show that at the time of the making of the notes by the railway company to the rolling mill company $300,000 of the first mortgage bonds of the railway company were pledged and left with the rolling mill company as collateral security for the payment of the notes, and that "*in the fall of* 1873" these bonds were worth "*something*," but had no quotable market value, were delivered by the rolling mill company to Ward, to indemnify him for his liability as endorser of said notes. The evidence tended to show further that at the time the said notes matured, "Ward was lessee of the railway, "and of the property, rights and franchises of said rail- "way company, and had possession thereof." (p. 19, printed record.)

The fact, if it is a fact, that the decedent was lessee of the railway company's property, rights and franchises, does not of itself tend to show that he was secured.

The existence of a lease warrants the presumption that rent is to be paid as a consideration for the use of the property demised. Its legal purport differs from a deed of assignment, mortgage or pledge, or any hypothecation of property as a security.

The most that can be said of the testimony regarding the receipt of the bonds is that at *some time* they were, to *some extent*, a security or indemnity against the decedent's liability as indorser of the notes, to the amount of $225,000.

That is not sufficient to constitute a waiver of a right to notice.

All the authorities agree that the security must be in the hands of the indorser *at the time* of the maturity of the paper. (Story on Promissory Notes, Sec. 281, and authorities there cited.)

The bonds were "worth something," but no one was found who could tell what that something was. Nor does it appear that those bonds constituted the whole estate and property of the company. If, therefore, it were assumed that the security, such as it was, was in the hands of the decedent at the time the notes in question matured, that would not operate to deprive him of his right to notice.

In order to operate as a waiver, the security must be shown to constitute *all* the property the maker has. (Story on Promissory Notes, Sec. 282, and cases there cited.)

The rule of law as laid down by this court, in *Ray* v. *Smith*, 17 Wall., 411, is even less favorable to the defendant in error than the authorities above cited, and the following quotation rom p. 415 is submitted as being the most just and practicable enunciation of the rule :

" It must be admitted there has been much inconsistency in the decisions respecting the application of this rule. In some it has been held that if an indorser has taken an indemnity from the maker, he is not entitled to notice of default. But this is not sustained by sound reason, and the best considered cases assert the contrary doctrine. The indemnity may prove insufficient. At all events it is not inconsistent with the existence of a remedy over against the maker, and the correct rule, as stated by BAILEY, J., in *Brown* v. *Maffey*, 15 East., 222, is that every indorser ought to have notice whenever he has a remedy over. All the cases agree, however, that when by arrangement between the maker and the indorser the latter has become the principal debtor, and primarily liable, he may not insist upon notice. Presentment to the maker followed by notice to himself can be of no service to him, for he has no remedy over. And he becomes the principal debtor when, either before or at the maturity of the note, he is supplied by the maker with sufficient funds for the purpose of paying it. Receiving the funds for such

an avowed purpose, he assumes an obligation to take up the note; and as has been said, he may be regarded as an agent who has undertaken to pay, and who, therefore, cannot be disappointed if his principal, trusting to his obligation, takes no further steps for the payment."

In *Haskell* v. *Boardman and another*, 8 Allen, 38, it was proved that before maturity of the note the defendants had received one mortgage of real and another of personal estate as security against liability as indorsers for the grantor. The mortgages covered all of the property of the grantor, and the property was sufficient to indemnify the defendants for all their engagements in his behalf.

The plaintiff had received from a bank, with which the note had been deposited for collection, notices for the indorsers, of its non-payment and protest in due form on Friday, but did not mail them the next day until after ten o'clock, which being a few minutes too late for the mail, the notices did not go till the following Monday.

The court held that the failure to mail them earlier on Saturday rendered the notices insufficient to charge the indorsers. On the question of waiver of notice the court, speaking through BIGELOW, C. J., say:

"There was no evidence offered at the trial on which a waiver of notice by the indorsers could be legally found. The mortgages relied on show such waiver were not made to enable the indorsers to pay the notes, nor were they authorized to appropriate the property thereby conveyed to such purpose. The effect of these conveyances was only to secure the defendants against the legal liabilities assumed by them in behalf or on account of the promisor. Their liability as indorsers was conditional only, dependent on the contingency of their having due and seasonable notice of the dishonor of the notes. Their claim on the property for indemnity was dependent on the like contingency. On this point the case is within *Creamer* v. *Perry*, 17 Pick., 332. There was no other fact in proof to warrant a jury in finding a waiver."

So in *Secord* v. *Miller*, 13 N.Y., 55, the Court of Appeals

reversing a judgment of the Supreme Court, held that a mortgage given before maturity of the note to indemnify the indorser was not a waiver of due notice. GARDINER, C. J., said:

"The security given in this case was designed as an indemnity against a contingent liability. It did not change the nature of the original contract, or amount to a performance of the condition precedent upon which that liability depended. I do not perceive how, upon the principle upon which this case was decided, an indorser could ever take an adequate security, without converting a conditional into an absolute contract for the payment of the money mentioned in the note. When the fund is deposited by the maker, and accepted by the indorser, for the purpose of paying the demand, the case may be different."

To the same effect are:

Moses v. *Ela*, 43 N. H., 557.
Kramer v. *Sandford*, 4 Watts & S., 328.
Denny v. *Palmer*, 5 Iredell, 610.
Wilson v. *Senier*, 14 Wis., 380.

If the testimony given had tended to prove, or had in fact fully proved "that at the time the notes matured "Ward was secured; that he held $300,000 of the mortgage "bonds of the railway company, and also *as lessee* had all "the property of the railway company in his possession and "control," that would not, agreeably to the authorities cited, be evidence on which a waiver of notice could be legally found.

But the testimony did not tend to prove "that *at the* "*time the notes matured* Ward held $300,000 of the "mortgage bonds of the railway company."

The testimony was that in *the fall* of 1873 the bonds were delivered to Ward. The last of the three notes in question matured October 19th, which was several weeks before the fall season expired; and it is just as probable that the bonds were delivered to him in November, as Oc-

tober or September. Where probabilities are equal, no preponderance of proof exists.

From this portion of the charge, the jury could readily come to the conclusion that the decedent was secured, and that his estate would lose nothing, even though they should find for the plaintiff.

IX.

THE CIRCUIT COURT ERRED IN CHARGING THE JURY AS FOLLOWS:

"There is proof tending to show that the transactions with the plaintiff were a direct loan of $40,000 from the plaintiff to Ward through the agency of Smith and Sturges."

The exception to this part of the charge was, that it is not supported by the evidence.

This part of the charge is objectionable for the same reasons as have been urged against that part of the charge first excepted to. The circumstances of the case were such as to forbid the inference that the loan was to Ward.

X.

THE CIRCUIT COURT ERRED IN AWARDING EXECUTION UPON THE JUDGMENT RENDERED AGAINST THE PLAINTIFF IN ERROR.

The State Supreme Court has repeatedly held that to award execution upon a judgment against an executor, is error.

Peck, Admr., v. *Stevens*, 5 Gil., 127, and cases there cited.

All of which is respectfully submitted.

GEORGE WILLARD,
Att'y for Plaintiff in Error.

CHICAGO, Feb'y, 1880.

FILED
OCT 25 1880
JAMES H. MCKENNEY, CLERK

IN THE

SUPREME COURT OF UNITED STATES.

ORRIN W. POTTER, Executor, &c.,
Plaintiff in Error,

v.

THE THIRD NATIONAL BANK,
Defendant in Error.

REPLY ON BEHALF OF PLAINTIFF IN ERROR.

GEO. WILLARD,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

ORRIN W. POTTER, Executor, &c.,
Plaintiff in Error,

v.

THE THIRD NATIONAL BANK,
Defendant in Error.

REPLY ON BEHALF OF PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

Counsel for the defendant in error insist that the evidence in the case supports the judgment, and upon the proof, as set forth in their briet, they aver that the court's charge contains no error; and that "it is difficult to treat "any of the exceptions to the charge of the court seri- "ously."

The disposition thus exhibited to treat the matter as a gest accounts for the omission from their brief of everything in the record having a serious aspect for their client, and, faithfully adhering to everything else.

Counsel have quoted from the record such evidence only as the court recited to the jury. This they claim is sufficient to support the verdict and judgment. But the record shows other evidence was given, and of such a character as would support a verdict and judgment in favor of the

defendant below. And if the Circuit Court had charged the jury *on all the material points* embraced in the testimony, and not singled out certain facts in evidence favorable only to the plaintiff below, and lost sight of all material facts favorable to the defendant, there would have been less ground for the prosecution of this writ.

If, instead of giving that part of the charge first excepted to, the court had said, "Gentlemen of the jury, the "evidence tends to prove that Smith was the agent and "broker of the Burlington & South Western Railway "Company, and that the notes in question and three oth-"ers were placed by the Railway Company with the Wy-"andotte Rolling Mill Company's endorsement on them "with Smith, for the purpose of raising money thereon— "that Smith, as the Railway Company's agent, secured "the aid and assistance of Sturges, and Sturges obtained "a call loan of $40,000 from the plaintiff for the Railway "Company"—is it not probable that the jury would have been misled into losing sight of Ward's connection in the matter, and thereby induced to bring in a verdict in his favor?

If such had been the charge, and a verdict and ~~pay-~~ judg ment had been rendered for the defendant below, I venture the assertion that the able counsel representing the bank, would hardly be contented to consider it merely as a joke on their client. In such event, the bank, instead of Ward's executor, would be here insisting on a reversal.

Counsel say (p. 22,) "That the Court was summing up "the evidence on the question of liability incurred by "Ward, and that to call the attention of the jury, in that "connection, to the rolling mill or railway company, would "have been as unnecessary and uncalled for, as it would "have been to have paused to remind the jury that Smith "was a Sunday school superintendent."

For the purposes of the bank, doubtless, that is true.

As in the charge, so in counsel's brief, there is no mention of the fact that the evidence tended to show that Smith was agent and broker of the railway company and the rolling mill company, and that his and Sturges' action in the matter could be attributed to those agencies, and also to themselves, individually, as justly as they could to Ward.

That part of the charge here referred to, constitutes the sixth assignment of error, and is a fair indication of the grounds upon which rests the seventh and ninth.

Smith's letter of October 11, 1873, to Pearce (p. 19, Print.) purports to be given in substance on page 14 counsel's brief, but omission is there made of the important fact *that money enough to pay the whole $40,000 could not possibly be raised.*

A telegram will be found on page 21, Print, showing that the matter of taking care of the notes was considered by Ward and Smith as an affair of the railway company's. Counsel have omitted it from their abstract of the correspondence.

Ward's letter to the bank, (p. 20, Print) is shown on page 15 brief, as an *individual letter*, whereas it is signed *as president.*

In fact, all evidence tending to show that Ward was acting in his capacity of president of the rolling mill, or as president of the railway company. is omitted from the charge, and studiously avoided in counsel's brief, although it purports to give a full abstract of all the evidence, including the letters and telegrams constituting the correspondence between the bank, Smith and Ward.

That part of the bill of exceptions showing the correspondence between Smith, Ward and the bank is set out on

pages 19 to 24, printed record, and, together with the oral evidence, the tendency of which is set out on pages 16, 17, and 18, will be found replete with evidence that Smith and Ward acted in the matter as officers and representatives of the railway company and of the rolling mill company, and that Sturges acted for himself in the matter of borrowing from the bank, and that if he had an agency it was as likely to be for Smith and the companies named as for Ward.

Counsel dissent from the proposition that the notes in question being renewal notes belonged to the railway company, and not to Ward. But the proposition seems too plain to admit of doubt.

The duty of the maker of a note is primary and absolute to pay at maturity. That of an indorser is secondary and conditional. Now, under the special agreement between the railway company and the rolling mill company, the notes were to be renewed an indefinite number of times, if the former could not pay at maturity. This did not change the order of liability of maker and endorser. It only gave the maker an additional resource with which to meet the notes as they fell due. It did not compel the indorsers to pay before their liability became absolute.

It is said (p. 13, brief) that the interests of indorsers in suits upon promissory notes is a balanced interest, and that Sturges had no *direct interest* in the event of the suit.

In *Rives* v. *Morrs*, 25 Ill., 315, it was held that the payee and first indorser would be a competent witness to prove waiver of notice in a suit by a holder of a bill of exchange against his immediate indorser. But the court says: "When a prior indorser is sued by the holder, a remote "indorser is held to be incompetent, as he has, in that case, "a direct interest in the event of the suit, as, by fixing the "liability of a prior indorser, he thereby becomes dis-

"charged from liability on his subsequent indorsement," citing:

Hayes v. *Gorham*, 2 Scam., 429.

Sturges was not only directly interested in the event of the suit, as an intermediate indorser, but he was also directly interested in the event of the suit, as being an alleged borrower of the very money for which recovery was sought. See Parsons' letter, p. 20, Print.

Respectfully submitted.

GEO. WILLARD,

Counsel for Plaintiff in Error.

FILED
OCT 26 188
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, A. D. 1880.

ORRIN W. POTTER, EXECUTOR OF EBER B. WARD, DECEASED,

v.

THE THIRD NATIONAL BANK OF CHICAGO.

No. 46.

In error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF OF F. H. KALES, ON THE PART OF PLAINTIFF IN ERROR.

On behalf of parties beneficially interested through the Executor prosecuting this writ of error, I desire to submit the following statement and points:

STATEMENT.

The court charged the jury, in substance, upon one point in the case, that if Ward, through his agents, made a call loan and deposited the promissory notes described in the declaration as collateral security therefor, it was immaterial whether Ward had or had not due notice of the dishonor of these notes.

POINTS.

Was not this an erroneous view?

The promissory notes referred to were made by the Burlington & Southwestern Railway Company and delivered to the Wyandotte Rolling Mill Company, and payable to its order, in payment for railroad iron. These notes were indorsed by the Rolling Mill Company, by Ward as president, and also by Ward individually, and by William Sturgis. And the theory is, that in April, 1873, a call loan of $40,000 was made by Ward, for the purpose of taking up certain of said series of notes which had then matured, or were about maturing, and that he pledged these and other notes as collateral security for the call loan in question.

1. This theory of the case, although stated in the bill of exceptions, is not reconcilable with the evidence as stated at length therein. No reason is perceived or shown why either Ward or the Rolling-Mill Company should desire to take up these notes, or to make a call loan for so doing. There is some evidence that Ward, at a later period, was president of the railway company, but it does not appear that Ward was acting on behalf of the railway company, in order to protect its credit in the matter of these notes. On the other hand, the Rolling-Mill Company was a creditor, and presumptively was desirous of obtaining its dues on these notes.

2. But, assuming as the court did, that the evidence tended to show that Ward, through his agents, made an original loan of the bank, for which he pledged these notes as collateral security, did that fact, as assumed by the court in its charge to the jury, render it immaterial whether or no notice of dishonor of the notes was given to Ward.

For the purposes of this question, the bank must be considered, for the time being, as the holder and indorsee

of these notes, indorsed as we have seen, in the following order: by the Rolling Company, by Ward individually, and by Sturgis individually.

There is no pretense that notice of dishonor was given to the Rolling Mill Company, unless through Ward, its president. The evidence wholly fails to show that any notice of dishonor was mailed to Ward, either individually or as president of the Rolling Mill Company. The failure to give such notice operated to discharge the Rolling Mill Company from liability to Ward. *Prima facie*, these notes, on the theory that Ward pledged them for a call loan of his own, were the property of Ward, and a failure to notify the Rolling Mill Company, who had indorsed them to him, or to notify Ward, so that he he could give the requisite notice, was a release of that company, to the extent of the face of the notes.

1 Parsons, Bills & N. 499.

It thus appears that the Rolling Mill Company, the immediate indorser to Ward, was, by the negligence of the Bank, released from liability to him on all of this paper, left by him in its hands as collateral security for his indebtedness.

It would seem that the general principle should here apply, as stated by elementary writers, "that anything "whatever done by a holder of a bill or note, which must "necessarily have the effect of destroying, delaying, "lessening, or in any way embarrassing the rights or "remedies of other parties against parties to them, dis-"charges all the parties thus injuriously affected, from any "claim by the holder himself, or by any who must claim "by or through him.

2 Parsons Bills & N. 241-2. (1st Ed).
Id. 244, and note (k).
Id. 239.
1 Id. 499.

In applying this rule, it can make no difference in principle whether the paper is held as collateral, or owned absolutely by the holder. In either case, the effect of a want of due care and diligence is the same, as respects intermediate indorsers, and in the one case, as in the other, the holder should be compelled "to make the paper his own," at its face, with all the risks attending it in its dishonored condition.

2 Parsons, Notes & Bills, 239, and note (v).
2 Daniel, Neg. Ins. (2nd Ed.) Sec. 970-1.

Indeed, the plaintiff, after failing to give due notice of dishonor, has, by retaining the notes and bringing suit upon them against Ward as indorser, elected to treat them as its own property and not merely as a collateral security.

If this view be correct, the notes should have been charged up at their face to the plaintiff in this case; and if that had been done, there was it seems, nothing due the plaintiff.

It may be claimed that the portion of the charge of the Court above referred to, is qualified by reference to a further statement elsewhere, to the effect that at the time these notes were made by the Railway Company, $300,000 of first mortgage bonds of the Railway Company were pledged and left with the Rolling Mill Company as collateral security for the payment of the notes, and that in the Fall of 1873, the Rolling Mill Company delivered these bonds to Ward, to indemnify him foa his liability as endorser; but,

1. The charge of the Court on the question of notice is not thus qualified, either directly, or, as it would seem, impliedly.

2. Yet, if so qualified, the qualification is not sound.

Indemnity of the character shown is, undoubtedly, a fund to which accommodation or other parties may resort according to their rights; but it will hardly be contended

that the taking of indemnity against liability as an accommodation indorser has the effect of dispensing with notice of dishonor of the indorsed paper.

If, then, the failure to notify Ward and the Rolling Mill Company of the dishonor of the notes in question had the effect of making this the paper of the bank, with all the risks attending it, so as to relieve Ward to the amount of the paper, the pleadings in the case are sufficient to give the executor the benefit of the defense.

The plea interposed is the general issue, with a stipulation in substance that all proper defenses may be availed of thereunder.

It is also claimed that Smith, as agent for Ward, requested that these notes should not be protested; and this is brought forward as evidence of a waiver of notice of dishonor.

The evidence is, in substance, that Smith or Ward was desirous of making a new arrangement with the plaintiff for a further loan or extension, and at the same time, requested that the notes should not be protested.

Had the bank accepted of the proposal and acted upon it, there might have been some ground for this claim; but it declined to do so and proceeded to protest the paper and give notice; in doing which, as we have seen, it failed to comply with the rules of law applicable to that subject.

It is further insisted as evidence of waiver, that there was a treaty between Ward and the bank, after the dishonor of the paper in question, looking to a payment thereof. But the general rule which is here applicable is, that a treaty for extension, and looking to future payment, does not operate to waive notice of dishonor, unless the extension is granted. It is submitted therefore that the charge of the court in the particular stated, was erroneous.

F. H. KALES,
Of Counsel.

SUPREME CO
FILED
APR 26 188

Supreme Court of the United States.

NO. 304.

ORRIN W. POTTER, Executor, Etc.,

vs.

THE THIRD NATIONAL BANK OF CHICAGO.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief for Defendent in Error.

John H. Thompson, **Huntington W. Jackson,**

ATTORNEYS AND OF COUNSEL FOR DEFT. IN ERROR.

CHICAGO:
CO-OPERATIVE PRINTING ASSOCIATION.
1880.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 304.

ORRIN W. POTTER, Executor, etc.,
Plaintiff in Error,
v.
THE THIRD NATIONAL BANK OF CHICAGO,
Defendant in Error.

Error to U. S. Circuit Court for the Northern District of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

[NOTE.—References to Record are to printed Record.]

STATEMENT OF CASE.

This suit was commenced by defendant in error against Eber B. Ward, in his lifetime, and prosecuted after his death against his executor, the plaintiff in error.

The defendant in error, plaintiff below, claimed to recover on two grounds:

First—The bank claimed that, in April, 1873, it loaned to Ward, on call, $40,000, taking as collateral security therefor the three notes described in the declaration, and three other similar notes. About half of this loan was paid, and three of the collateral notes surrendered, in October, 1873, and plaintiff claimed the balance of the loan, with interest.

The pleadings are sufficient to sustain the verdict and judgment on this ground.

The declaration contained the money counts, for money lent and advanced by the plaintiff to the defendant, and for interest, etc. (Rec. 9.)

Second—Plaintiff also claimed to recover on the ground that Ward was liable as indorser of the three notes described in the declaration, he having had notice of protest or having waived notice, or not being entitled to notice of non-payment.

There was, in the declaration, a count on each note against Ward as indorser, alleging notice, etc. Additional counts were, by leave of the Court, filed on the trial, alleging a waiver of notice; but this was probably unnecessary, as the plaintiff was entitled to show a waiver of notice, or excuse for not giving notice under an averment of notice, the circumstances which dispense with a formal notice

amounting to an implied or constructive notice sufficient to satisfy a general allegation of notice.

Firth v. *Thrush*, 8 Barn. & Cress., 387, S. C. 2 Man. & Ryl., 359.
Boot et al. v. *Franklin*, 3 Johns., 207,
1 Parsons on Notes and Bills, 465.

The declaration was amended on the trial by adding counts alleging a waiver of notice. (Rec. 13, 14, 15.)

This amendment was allowed under the statute of Illinois which provides:

"At any time before final judgment in a civil suit amendments may be allowed on such terms as are just and reasonable * * * in any matter, either of form or substance, in any process, pleading, or proceeding, which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense."

Ills. Rev. St., chap. 110, sec. 24.

"Under the plenary powers thus conferred upon the Court, we entertain no doubt it could permit any amendment which might be necessary to enable plaintiff to maintain the action for the claim for which it was intended to be brought.

Healy v. *Charnley*, 79 Ill., 592.

"Under our statute it is hardly ever too late to amend

pleadings, whether before or after verdict, on such terms as justice may seem to demand."

Thompson v. *Sornberger*, 78 Ill., 353.

1. The evidence to sustain the verdict on the first ground of recovery is clear and ample.

"The plaintiff introduced evidence tending to show that in the month of April, 1873, said plaintiff at the city of Chicago, Cook County, Illinois, loaned to Eber B. Ward, on call, the sum of forty thousand dollars, and as collateral security therefor received the certain promissory notes described in the declaration," etc. (Rec. 16.)

"Evidence was also given tending to show that the said Elijah Smith was the agent and broker of the said Ward, and of the said rolling mill company, and of said railway company, in the matter of negotiating paper for them respectively, and that in the month of April, 1873, said Smith, who was also then the President of said railway company, at the instance of said Ward, sought to make a loan of $40,000 for the purpose of taking up certain of said series of notes, which had then matured or were about maturing, upon the notes in question and others of the same character as collateral security; that one William Sturgess, whose name appears as indorser upon said notes, suggested to the said Smith that said loan could be made of the plaintiff, and at the request of said Smith said Sturgess took said notes from Boston to Chicago, and ap-

plied for such loan, and the plaintiff made said loan on call, taking the notes in question and three other notes of similar amount as collateral security." (Rec. 17–18.)

"Plaintiff also introduced evidence tending to show that, about the time said notes fell due, said Smith, at the instance of Ward, requested the Second National Bank of Boston, to whom said note had been sent for collection, not to protest said notes, as he was making arrangements to raise money to pay half the loan and to extend the balance." (Rec. 18.)

William Sturges "gave testimony tending to show that said loan was made through his agency for the benefit of said Ward, at the instance of said Smith." (Rec. 18.)

About one-half of the loan was paid Oct. 17, 1873, the bank giving up three of the collateral notes and retaining the three described in the declaration. There was no claim that the balance of the loan had been paid.

As a matter of fact, the verdict was rendered on the ground that it was a direct loan, as will be seen by its amount. The Court in the last part of the charge instructed the jury that if they found Ward liable as indorser, the measure of damages would be the amount of the notes with six per cent. interest from the time they fell due, and that if they found it was a loan at ten per cent. interest, as stated by witness, the measure of damages would be the $20,000 unpaid, with interest at ten per cent.

A computation will show that the verdict was rendered on the basis of a direct loan.

2. The evidence to sustain the verdict on the second ground, liability on the notes declared on as indorser, is substantially this:

The notes with endorsements of Ward were introduced in evidence. (Rec. 17.)

"Plaintiff also introduced evidence tending to show that demand having been made for said loan, and the same not having been paid, said notes were by the plaintiff sent to the Second National Bank of Boston, in the State of Massachusetts, for presentation for payment and collection; that said notes were respectively presented for payment, and the same not having been paid, each of them were protested, and notices in writing of such protests for each of the indorsers were mailed to the address of said plaintiff at Chicago, the notary certifying that he did not know the residence of the said indorsers, and on the receipt of the said notices which were intended for the said Sturgess and the said Ward the same were sent to the said Sturgess and Ward. It was admitted by the said Sturgess in open court that he received the notice intended for him. It was also admitted that the address of said Ward was Detroit, Michigan, but there was no evidence showing that the notice intended for him was actually mailed to him at his said address. Evidence was introduced tending to show that in the due course of the business in the office of said plaintiff,

said notice, if received from the notary at Boston, would have been forwarded to said Ward to his address at Detroit, but none of the officers or clerks of the plaintiff could recollect affirmatively or positively of the transaction, and the only evidence upon the question of whether the notice was forwarded to Ward or not was evidence as to the course of business in the office." (Rec. 17.)

The evidence as to the sending of the notices to Ward not showing positively and affirmatively that the notices were sent, the Court instructed the jury that this evidence was not sufficient to fix the liability of Ward as indorser.

To show a waiver of notice by Ward, and an excuse for not giving notice, the evidence was mainly this:

"Plaintiff also introduced evidence tending to show that about the time said notes fell due, said Smith, at the instance of Ward, requested the Second National Bank of Boston, to whom said notes had been sent for collection, not to protest said notes, as he was making arrangements to raise money to pay half the loan and to extend the balance." (Rec. 18.)

"Plaintiff also introduced evidence tending to show that, at about the time the said notes fell due, certain parties residing at New Bedford, Massachusetts, who were interested as stockholders and bondholders of the said Burlington and Southwestern Railway Company, raised the sum of one hundred thousand dollars, and placed it in the hands of the said Ward, for the purpose of meeting certain liabilities

which said Ward had incurred as indorser for said company, among which was the forty-thousand dollar loan in question; that, at the instance of said Ward, after said money was raised, application was made to said plaintiff to accept one-half of said loan and extend the loan for sixty days, so as to enable Ward to use $20,000 of said fund to meet other obligations where he was liable as indorser for said railway company. The plaintiff, with the consent of said Sturgess, agreed to such extension, and on the 17th of October received one-half of said loan and delivered over one-half the collaterals, retaining the notes described in the declaration. The Second National Bank of Boston, not having been instructed, however, to withhold protest, caused said notes to be protested, as above stated, and the same, after protest, were returned to the possession of the plaintiff." (Rec. 18.)

"Plaintiff also introduced evidence tending to show that at the time of the making of the said notes by said railway company three hundred thousand dollars of the first mortgage bonds of said railway company were pledged and left with said rolling mill company as collateral security for the payment of said notes, and that in the fall of 1873 said rolling mill company delivered said bonds to said Ward to indemnify him for his liability as indorser on said notes; and it was admitted on said trial that at the time said bonds were turned over to said Ward they were worth something, but had no quotable market value.

Plaintiff also introduced evidence tending to show that at the time said notes matured said Ward was lessee of the

railway and of the property, rights, and franchises of said railway company, and had possession thereof."(Rec. 18, 19.)

The evidence being sufficient to sustain the finding of the jury on the ground that there was a direct loan to Ward, and also on the liability of Ward as indorser of the notes, it remains to consider whether there is any ground for reversing the judgment upon the errors assigned by plaintiff in error.

Counsel for plaintiff in error has assigned upon the record five errors, and these he has enlarged and increased in his brief to thirteen, and we will consider these in the order in which he has discussed them in his brief.

ERRORS ASSIGNED.

I.

ADMISSION OF EVIDENCE TO THE EFFECT THAT BY THE DUE COURSE OF BUSINESS IN PLAINTIFF'S OFFICE THE NOTICES OF PROTEST WOULD HAVE BEEN FORWARDED BY MAIL TO WARD IF RECEIVED FROM THE NOTARY. (Rec. 17.)

1. Evidence of usage, custom, and practice of bankers, counting-houses, and notaries has always been held admissible in evidence as tending to prove the sending of notices. Even the cases cited by counsel for plaintiff in error show that such evidence is competent.

In *Heathington* v. *Kemp*, 4 Camp., 192, there was evidence that a letter was written and placed on a table where, according to the usage of the counting-house, letters were

deposited for the post. The porter who carried the letters to the post was not called. Lord Ellenborough said, "Had you called the porter, and he had said that he carried all letters found on the table, it might have done."

In *Hawkes* v. *Salter* there was no evidence that the letter was put in the post.

In *Toosey* v. *Williams*, 1 Moody & M., 129, a clerk "stated the practice in the defendant's office to have been for him to copy into the book all letters for India; that when copied they were given to defendant to seal, and afterwards carried, either by the witness or another clerk, to the letter office;" but neither clerk had any recollection of this letter. Lord Tenterden said: 'If the duty of the clerk had been to see the letters he copied carried to the postoffice, it might have done; but here there is something else to be done afterwards, and that by the defendant."

In *Com. Bank* v. *Strong*, 28 Vt., 316, it was proved to be the duty of one clerk of a bank to fill out and direct notices and to place them on his desk. It was the duty of another clerk to take the notices to the postoffice. The notice was proved to have been left in the usual place on a certain day, and on the same day removed. The clerk whose duty it was to carry letters to the postoffice testified that his usual practice was to carry them promptly, but he could not swear that he carried this particular notice. Held sufficient proof of notice. Redfield, C. J., in this case shows that the proposition in Chitty on Bills, that the holder

must "prove distinctly and by positive evidence that due notice was given," is not supported by the authorities.

In *Miller* v. *Hackley*, 5 John., 375, a notary testified "that *it was his usual practice* as notary, on the evening of the day of the protest, and in all cases of protest, to give notice in writing to the indorsers residing at a distance, by putting such notice in the postoffice directed to the party at his place of residence; and he had no doubt notice in this case was duly given, though at that distance of time he could not recollect positively; and that it was possible he might have given the notice to the holder to be forwarded." Held sufficient proof of notice.

This question is elaborately discussed in *Bell* v. *The Hagerstown Bank*, 7 Gill, 216.

2. But if this evidence was inadmissible it does the plaintiff in error no harm, for the Court instructed the jury that the proof was insufficient to fix Ward's liability as indorser on ground that he had received due notice. (Rec. 26.)

II.

Admitting in Evidence Testimony of Witness Sturgess.

1. Sturgess was not a party and never was a party to this suit. It is claimed that he was interested in the result of the suit by reason of being an indorser on the notes.

The law of the United States, at the time of this trial, was as follows:

"In the Courts of the United States no witness shall be

excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the Court. In all other respects the laws of the State in which the Court is held shall be the rules of decision as to the competency of witnesses in the Courts of the United States in trials at common law, and in equity and admiralty."

U. S. Rev. St., sec. 858.

The legislation of Congress has left many questions as to the competency of witnesses in a United States Court to be settled by the laws of the State in which the Court is held, but the competency of a witness interested in the issue tried is not one of these questions. That is settled for all Courts of the United States, and this Court has very properly and forcibly said: "Undoubtedly the act of Congress has cut up by the roots all objections to the competency of a witness on account of interest."

Lucas v. *Brooks*, 18 Wall., 453.

2. But under the laws of Illinois there was no ground for the objection. The statute of Illinois, after providing that no person shall be disqualified as a witness, provides that "no party to any civil action, suit, or proceeding, or person *directly interested* in the event thereof, shall be

allowed to testify therein *of his own motion, or in his own behalf*," etc., when an adverse party sues or defends as executor, etc.

This statute prevents a person directly interested in the event of a suit from testifying of his own motion, or in his own behalf.

Sturgess was not directly interested in the event of this suit. No judgment could be rendered for or against him in the suit. The record of any recovery could not be used against him. Greenleaf says that the interest of parties to bills of exchange and promissory notes will, in general, be found to be equal on both sides—a balanced interest.

1 Greenleaf Ev. secs. 399, 400.

This statute refers to a *direct interest* in the event of the suit, and certainly Sturgess had no such interest.

Then the statute prevents a person directly interested in the event of the suit from testifying "of his own motion or in his own behalf."

Sturgess did not testify of his own motion or in his own behalf. He was a witness called by the plaintiff. (Rec. 18.)

III.

Letter of Parsons, Cashier, of Dec. 11, 1873.

There was evidence tending to show that Ward and Smith were in New Bedford, Mass., about the time the

notes in question became due, and $100,000 was raised by parties interested in the B. & S. R. Co. and placed in the hands of Ward to meet this and other debts; that about one-half of the debt due to the plaintiff below was paid, and the plaintiff agreed to extend the balance sixty days, new notes similar to those in suit to be given. There was a correspondence between the bank on one side and Ward and Smith on the other as to this extension and the new notes to be given, and the payment of the money, extending from about the time the notes became due in October to the 23d day of December, 1873, all tending to show a waiver of demand and notice of protest, and a promise to pay this debt by Ward, and in the course of this correspondence this letter of Dec. 11, 1873, was written.

This correspondence as shown by the record is substantially as follows:

Oct 2, 1873, Parsons, cashier, writes to Ward that the notes are at the Second National Bank in Boston, and must be paid.

Oct. 11, 1873, Smith writes to President of bank that he and Ward had been in New Bedford to raise money, and thought that by Wednesday they should have money to pay one-half and extend the other sixty days.

Oct. 16, Smith writes to Burt, Treasurer, as to arrangements of extension.

Oct. 18, 1873, Smith writes to President that the last

piece of Ward's paper was protested that day, and asks for statement with view to the new notes on sixty days, and says he will have the notes prepared and sent to Detroit for indorsement, and forwarded to bank from there.

Oct. 22, 1873, Ward writes to bank that he has "obtained the money to pay one-half the notes of the B. & S. W. Ry.," but don't see how he can meet the balance in sixty days, and suggests that if the bank would extend the balance four months he had no doubt it could all be paid.

Oct. 23, 1873, Parsons, cashier, writes Ward that the bank supposed it was lenient with him when it agreed to accept one-half the amount of the loan and extend the other half sixty days, and that this arrangement must be carried out.

Same day Parsons writes Smith giving statement of matters, and asking to have the new notes made and forwarded at once, and saying, "Ward writes us that he fears he shall not be able to meet them, and wants them made at four months, but we will not accept it."

Oct. 24, 1873, Smith writes President inclosing telegram showing that Ward had telegraphed to ask if Chicago notes could not be extended four months instead of two, and suggests that if bank could not extend whole four months it would help if three notes were made on sixty, ninety, and one hundred and twenty days.

Oct. 28, 1873, Parsons writes to Smith refusing to extend for more than sixty days.

Nov. 5, 1873, Parsons writes to Ward, refers to agreement for extension of sixty days, and says, "We have waited now seventeen days, and the new notes have not yet come to hand."

Nov. 8, 1873, Ward telegraphs to Smith for the *new notes*.

Nov. 8, 1873, Smith writes President of bank that *he has sent to E. B. Ward* to indorse and forward B. & S. W. notes, dated Oct. 17, at 60 days, for $21,577.49, which he makes amount for which the notes should be made, and requests bank to "*forward the old notes to E. B. Ward*, unless he instructs you to send elsewhere."

Nov. 10, 1873, Ward writes to cashier, excusing delay, and asking for statement.

Nov. 18, 1873, Ward writes cashier that "our attorney Mr. T. C. Owen, will go to Chicago on Thursday or Friday, and will take with him the renewal notes for B. & S. R. R."

Then comes the letter objected to, dated December 11, 1873, in which Parsons writes to Smith and refers to the agreement for extension, and says the paper (the new notes) has never been received. "The amount in paper made on four months' time was sent us instead, which has been returned to Mr. Ward, and he advised through his attorney that we should expect the 60-day paper to be sent to us as agreed. The 60 days, with grace, will expire on the 19th, when, if payment is not made, we shall take such means to collect the notes held by us as we shall deem best."

Dec. 23, 1873, Smith replies to this letter, saying among other things: "I telegraphed you, at Captain Ward's request, to renew one-half at 60 days, provided one-half was paid cash; and the notes were afterwards made at 60 days, and sent out to Ward; that was the last I knew of it. * * * I have not heard what was the final result, but hope that Ward paid it up and closed up the business." (Rec. 19–24.)

This whole correspondence related to the same matter the payment and extension of the loan and notes. The letter of Dec. 11, 1873, is singled out for objection. This letter contains nothing which is not shown by other letters and evidence, unless it be that, in place of the notes which were to have been made at 60 days, Ward sent notes at four months, which the bank returned to him, and the fact that Ward wanted to arrange such extension for four months is shown by his own letters.

The plaintiff, introducing the letter of Smith of Dec. 23, 1873, was bound to give in evidence the letter of Parsons, of Dec. 11, 1873, to which Smith's letter was a reply.

Watson v. *Moore*, 1 Carrington & Kirwan, 626.

This letter was clearly admissible in evidence, as counsel seems to concede as part of the *res gestae*. The whole correspondence, of which this letter was a part, tended to show an agreement for an extension of half the loan for sixty days, the bank to receive new notes in place of those maturing in October, 1873. The bank stood by this agree-

ment, and kept calling for the new notes until the sixty days had nearly expired, and in this letter notified Ward when the sixty days would expire and payment of balance be expected. The correspondence shows that Ward made the agreement for extension; that he promised to send the notes, but delayed from time to time; and, after getting the notes for sixty days, got some others for four months, and tried to force a further extension.

IV.

Sustaining Objection to Declarations of Ward.

Plaintiff in error offered to prove by a witness that Ward in his lifetime told the witness that he had never received notice of protest of the notes in question. (Rec. 25.)

1. Plaintiff in error did not offer to prove such statement made at or about the time the notices should have been sent, but only in his lifetime, which might have been, and probably was, after this suit was commenced and when Ward was looking about for evidence on which to defend the suit, for in his letters written some time after the notices should have been received he made no such statement.

In *Insurance Co.* v. *Moseley*, 8 Wall., 397, this Court may be said to have gone pretty far in applying the doctrine of *res gestae*, certainly further than two members of the Court were prepared to go; but neither this Court nor any other court has gone to such high latitudes as to make the declaration of a party, made under such circumstances as these, competent evidence.

Here was an isloated declaration or statement, not accompanying any act done, made for anything that appears long after these transactions and after suit brought, and clearly inadmissible in evidence. If such evidence was admitted by the courts, a man on being sued on a promissory note might make a statement to a third person that he had paid or did not owe the note, and if he died before trial the proof of such a statement might constitute a defense to the suit.

2. But this evidence, if admitted, merely tended to show that notices of protest were not sent, and would not have affected the case, as the Court held and instructed the jury that the evidence of the sending of the notices was not sufficient to charge Ward as indorser. (Rec. 26.)

V.

Letter written at instance of Ward to Burt as to Notices of Protest, and Letter of Notary in answer.

This evidence is treated by counsel for plaintiff in error as standing on the same footing as the statement of Ward, under what is classed as the fourth error.

The writing of this letter is not connected with any act; it tends to show that Ward was looking about to trump up some defense to this suit, and if it tends to show anything else it is only that he did not receive the notices of protest; and on this point, as already stated, the Court ruled in favor of the plaintiff in error, and the evidence could have done him no good. (Rec. 26.)

VI.

First Exception to Part of Charge.

Part of Charge Excepted to.	Evidence Sustaining Charge.
1. That the evidence tends to prove that Elijah Smith was the agent and broker of Capt. Ward, and that the notes in question and three others were placed by Ward, with his indorsement on them, with Smith, for the purpose of raising money thereon. That Smith, as Ward's agent, secured the aid and assistance of Sturgess, and Sturgess obtained a call loan of $40,000 from the plaintiff for Ward.	"Plaintiff introduced evidence tending to show that in the month of April, 1873, said plaintiff loaned to Eber B. Ward, on call, the sum of forty thousand dollars, and as collateral security therefor received the certain promissory notes described in the declaration." (Rec. 16.) "Plaintiff also introduced evidence tending to show that said E. B. Ward was President of the Wyandott Rolling Mill Company;" * * * that "it was agreed between the said rolling mill company and the said railway company" (B. & S. W. R. C.), "that said railway company would execute promissory notes payable to the order of said rolling mill company; that said Ward would indorse said notes as president and individually, and sell or pledge them." (Rec. 17.) "Evidence was also given tending to show that the said Elijah Smith was the agent and broker of the said Ward, and of the said rolling mill company, and of said railway company, in the matter of negotiating paper for them respectively, and that in the month of April, 1873, said Smith, who was also then the President of said railway company, at the instance of said Ward sought to make a loan of $40,000 for the purpose of taking up certain of said series of notes, which had then matured or were about maturing, upon the notes in question and others of the same character, as collateral security; that one William Sturgess, whose name appears as indorser upon

> said notes, suggested to the said Smith that said loan could be made of the plaintiff, and at the request of said Smith said Sturgess took said notes from Boston to Chicago and applied for such loan, and the plaintiff made said loan on call, taking the notes in question and three other notes of similar amount as collateral security." (Rec. 17-18.)
>
> William Sturgess "gave testimony tending to show that said loan was made through his agency *for the benefit of said Ward* at the instance of said Smith." (Rec. 18.)
>
> Same witness testified to a conversation with Ward after the loan was made in which "witness informed him (Ward) that he said witness had got the money of the plaintiff for Smith and Ward, at which Ward seemed gratified, and asked witness if he (witness) could not probably carry it along a while *for him* Ward." (Rec. 18.)

It is difficult to treat any of the exceptions to the charge of the Court seriously. Certainly, more absurd or more unfounded exceptions to a charge were never taken.

Counsel says it is "error in a Court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered." True, but nothing of the kind was done in this charge.

Counsel insists that all the evidence was for the consideration of the jury; and that is just what the Judge charged the jury, saying to them it "is a question of fact to be passed upon by you in the light of all the proof in the case," "the testimony to be all taken together," and

fairly reviewing the whole case. If the Court did not call the attention of the jury to much evidence favorable to the defendant, it was because there was very little such evidence in the case.

Counsel admits the proof tended to show that Smith was the agent and broker of Ward, but says that it also tended to show that he was the agent and broker of the Rolling Mill Co. and the Railway Co.

Suppose it did. The Court was here summing up the evidence on the question of the liability incurred by Ward, and to call the attention of the jury in this connection to the Rolling Mill or Railway Co. would have been as unnecessary and uncalled for as it would have been to have paused to remind the jury that Smith was a Sunday-school superintendent.

"That the notes in question and three others were placed by Ward, with his indorsement on them, with Smith," counsel says, "is true, but the notes, being second renewals, *belonged to the Railway Company and not to Ward.*"

This is an extraordinary proposition. The Railway Co. bought iron of the Rolling Mill Co., and gave its notes for the iron to the Rolling Mill Co., and the Rolling Mill Co. transferred the notes to Ward, who sold or pledged the notes to raise money on them. Then the Railway Co. made the notes in question, and delivered them to the Rolling Mill Co., which transferred them to Ward, and Ward pledges them to raise money with which to pay and take

up the first notes, or notes made and sold by him to take up such notes. In what sense do these notes in the hands of Ward belong to the Railway Co.? There is, in fiction, a character who, on delivering his note for a debt, thanked God that there was another debt paid; but he did not go to the extent of claiming that his note so given belonged to him, and this shows that truth, or at least the counsel's law, "is stranger than fiction."

That the notes were placed by Ward with Smith "for the purpose of raising money thereon" counsel says is true; but he says "the money which was to be raised thereon was to enable the Railway Co. to pay its debts, and not for Ward's use."

There is no evidence that the money was to be used to enable the Railway Co. to pay its debts, or that a dollar of the money was so used.

The evidence, as shown by the record, tended to show that the bank "loaned to Eber B. Ward, on call, the sum of forty thousand dollars, and as collateral security therefor received certain promissory notes," etc. (Rec. 16.)

"That said loan was made through his (Sturgess') agency *for the benefit of said Ward*" (Rec. 18); that when Sturgess told Ward that he had got the money of the plaintiff for Smith and Ward, Ward seemed gratified, and asked witness if he could not probably carry it along awhile *for him Ward*. (Rec. 18.)

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There is no evidence tending to show that any indebtedness of the Railway Co. was paid with this money.

Counsel says that the evidence tended in an equal or greater degree to prove that Smith, as President, agent, or broker of the railway company, or of the rolling mill company, secured the aid and assistance of Sturgess.

The proof shows clearly that the money on these notes as security was obtained by Ward as an individual for Ward as an individual, through Smith, *at the instance of* and as the broker and agent of Ward as an individual, and that Smith secured the assistance of Sturgess in obtaining the money. If the money had been raised for the railway company, or applied in payment of its debt, or for the rolling mill company, it would have been easy to have shown it. Nothing of the sort was shown. No part of the debt of the railway company was paid from the proceeds of this loan.

Counsel does not deny that the evidence tended to prove "that Sturgess obtained a call loan of $40,000 from the plaintiff for Ward," but says that it "tended in an equal or greater degree to show that Sturgess obtained the loan for himself or for the railway company or for the rolling mill company."

There is abundant evidence in the case showing that the loan was made to Ward and for Ward.

The Court in the charge said:

"Sturgess has testified that he was a mere negotiator in the transaction, and Mr. Smith has given evidence tending to show that *the loan was wholly for Captain Ward's benefit.* (Rec. 29.)

This statement was not excepted to.

The only thing in the record to warrant the statement of counsel that the loan was obtained for Sturgess, is the letter of the cashier of Oct. 23, 1873, in which the loan is spoken of as a loan to Wm. Sturgess, but this is not inconsistent with the idea that the loan was to Sturgess as agent of Ward; and on the same day this letter was written the same cashier wrote to Ward mentioning the loan and treating Ward as the debtor.

VII.

Second Exception to Charge.

Part of Charge Excepted to.

"That about the time these notes fell due, Ward and Smith, and other parties interested in the railway company, met at New Bedford, Mass., for the purpose of raising money with which to meet these notes, or rather this loan, and by some arrangement between Ward and certain parties interested in the railway company it was agreed they would raise for Ward $100,000, $40,000 of which was to meet this loan, and the balance was to be used by Ward to meet certain other liabilities, and the money was accordingly raised; and that after the arrangement had been effected, Ward suggested to Smith an application to the bank to take one-half this loan when due, and extend the balance for sixty days, suggesting that this would enable him (Ward) to use $20,000 of the $40,000 in other matters where he had great need of money."

Evidence Sustaining Charge.

Plaintiff also introduced evidence tending to show that, at about the time the said notes fell due, certain parties residing at New Bedford, Massachusetts, who were interested as stockholders and bondholders of the said Burlington and Southwestern Railway Company, raised the sum of one hundred thousand dollars and placed it in the hands of the said Ward, for the purpose of meeting certain liabilities which said Ward had incurred as indorser for said company, among which was the forty thousand dollar loan in question; that at the instance of said Ward, after said money was raised, application was made to said plaintiff to accept one-half of said loan and extend the balance for sixty days, so as to enable Ward to use $20,000 of said fund to meet other obligations where he was liable as indorser for said railway company. (Rec. 18.)

It will be observed that this part of the charge is part of what the Court said "the plaintiff's testimony tends to prove," the Court commencing the statement on page 25 of the Record.

The counsel says that "this portion of the charge improperly assumed that the full sum of $100,000 was raised," but the Record shows that there was evidence "tending to show that at about the time the said notes fell due certain parties residing at New Bedford, Massachusetts, who were interested as stockholders and bondholders of the said Burlington & Southwestern Railway Company, *raised the sum of one hundred thousand dollars and placed it in the hands of said Ward* for the purpose of meeting certain liabilities which said Ward had incurred as indorser for said company, *among which was the forty thousand dollar loan in question.*" (Rec. 18.)

Where is the improper assumption?

Smith's letter of October 11, 1873, was written before the money was obtained, and Ward's letter of October 22d is not honest enough to admit the whole facts.

VIII.

Third Exception to Charge.

Part of Charge Excepted To.	Evidence Sustaining Charge.
"The plaintiff has also given testimony tending to show that	"Plaintiff also introduced evidence tending to show that, at the time of the making of the

at the time when these notes matured Ward was secured; that he held $300,000 of the mortgage bonds of the Railway Company, and also, as lessee, had all the property of the Railroad Company in his possession and control."

said notes by said Railway Company to said Rolling Mill Company, three hundred thousand dollars of the first mortgage bonds of said Railway Company were pledged and left with said Rolling Mill Company as collateral security for the payment of said notes, and that in the fall of 1873 said Rolling Mill Company delivered said bonds to said Ward to indemnify him for his liability as indorser on said notes; and it was admitted on said trial that at the time said bonds were turned over to said Ward they were worth something, but had no quotable market value."

"Plaintiff also introduced evidence tending to show that at the time said notes matured said Ward was lessee of the railway, and of the property rights and franchises of said Railway Company, and had possession thereof." (Rec. 18,19.)

"Plaintiff also introduced evidence tending to show that at about the time the said notes fell due certain parties residing at New Bedford, Massachusetts, who were interested as stockholders and bondholders of the said Burlington & Southwestern Railway Company, raised the sum of one hundred thousand dollars and placed it in the hands of the said Ward, for the purpose of meeting certain liabilities which said Ward had incurred as indorser for said company, among which was the forty thousand dollar loan in question." (Rec. 18.)

This is a sentence from the part of the charge in which the Court reviews the evidence of the question of a waiver

of notice by Ward and excuse for not giving notice. The evidence on this point tended to show:

1. That Ward, through his agent, Smith, requested the bank holding the notes not to protest them. (Rec. 18.)

This is a sufficient waiver of notice to sustain the verdict and judgment.

Scott v. *Greer*, 10 Penn. St., 103.

2. That parties interested in the railway company had raised and placed in Ward's hands $100,000, to meet this paper. (Rec. 18.)

This evidence would sustain the judgment.

Curtis v. *Martin*, 20 Ill., 557.

3. That an arrangement was made between the bank and Ward for the extension of this debt, the bank to receive sixty-day paper. (Rec. 18.)

This is sufficient.

Amoskeag Bank v. *Moore*, 37 N. H., 539.
Ridgway v. *Day*, 13 Penn. St., 208.

4. That Ward, after maturity of the notes, and knowledge that he has not received notices of protest, admitted his liability on them, and promised to forward new notes in place of them. (Letters, Oct. 22, Oct. 24, Nov. 5, Nov. 10, 1873.)

This is sufficient.

Thornton v. *Wynn*, 12 Wheat. 183.
Segerson v. *Mathews*, 20 How., 496.

5. That first mortgage bonds of the railway company to the amount of $300,000 were delivered to Ward in the fall of 1873 to indemnify him for his liability on said notes, and that when said notes matured Ward was lessee of the railway and had possession of the railway and of the property, rights, and franchises of the railway company. (Rec. 18, 19.)

The law in regard to waiver of notice and excuses for not giving notice was laid down by the Court in his charge, and is not excepted to. The question of waiver and excuse was left to the jury as a question of fact, and there was evidence enough to show such waiver and excuse apart from the $300,000 bonds and the property of the railway.

That evidence tending to show that $300,000 of the first mortgage bonds of the railway company were pledged with the rolling mill company when the notes were first made as collateral security for these notes, and were in the fall of 1873 delivered to Ward to indemnify him for his liability on these notes as indorser, and that when the notes matured Ward had the possession and control of the property rights and franchises of the railway company, certainly *tends* to show that Ward was secured.

That the parties interested in the railway company raised and placed in his hands $100,000, makes it quite certain that he was secured.

The question whether notice was waived by he indorser

in any of the ways which the plaintiff claimed was left fairly to the jury as a question of fact. The Court did not, as in the case of *Ray* v. *Smith*, 17 Wall., 411, take the question from the jury, and it is difficult to see how upon the statement by the Court to which exception is taken the counsel is warranted in the discussion upon which he has entered.

Counsel says that the fact that Ward had possession and control of the railway company's property rights and franchises as lessee does not tend to show that he was secured. But would not the possession and control of the property rights and franchises of the company entitle Ward to retain the rental, if any there was, to pay any liability so incurred for the company? Does it not tend to show a security in his hands? Counsel says that the $300,000 first mortgage bonds do not appear to be a sufficent security, as the testimony shows that they were worth something, but had no quotable market value. The fact that securities have no quotable market value merely shows that they are not on the market. Many of the most valuable securities have no quotable market value, for the reason that the holders esteem them so highly that they do not offer them for sale. The possession of such an amount of first mortgage bonds certainly tends to show a security.

Counsel says that the testimony tending to show that these bonds were delivered to Ward in the fall of 1873 did not tend to show that they were held by Ward when the notes matured in October, 1873. Certainly the evidence

tended to show that they were held by Ward when the notes matured, and the further fact shown by the evidence that these bonds were delivered by the railway company, when the notes were first made as collateral security for the notes, tends to show the same thing.

The whole evidence on this question of waiver or excuse brings the case clearly within the rule laid down by this court in *Ray* v. *Smith*, 17 Wall., 411. "All the cases agree, however, that when by arrangement between the maker and the indorser the latter has become the principal debtor and primarily liable, he may not insist upon notice. Presentment to the maker followed by notice to himself can be of no service to him, for he has no remedy over. And he becomes the principal debtor when either before or at the maturity of the note he is supplied by the maker with sufficent funds for the purpose of paying it."

IX.

Fourth Exception to Charge.

"There is proof tending to show that the transactions with the plaintiff were a direct loan of $40,000 from the plaintiff to Ward, through the agency of Smith and Sturgess."

Attention has already been called to the testimony warranting this statement, and it is unnecessary to repeat it. The testimony was ample and the question was one of fact fairly left to the jury as a question of fact.

Remarks on Exceptions to Charge.

It will be observed that no exception is taken to any part of the charge in which the jury were instructed as to the law. The exceptions are all to statements of the Court reviewing and submitting to the jury for their decision the evidence.

The testimony is not presented in detail by the bill of exceptions, and some presumptions must be indulged in favor of the statements of a Judge who had heard the evidence in detail. The Court fairly reviewed the testimony, stated the claim of the plaintiff, and then stated the position and claim of the defendant, giving the defendant the benefit of a strong and clear statement of the only defense made; then stated to the jury the law upon the points made, to which statements of the law no exception was taken; and then left to the jury as questions of fact, the question whether it was a direct loan made to Ward, and the question whether there was a waiver of notice by Ward as indorser, and whether there was a sufficient excuse for not giving notice, to be determined by the jury "in the light of all the proof in the case," "the testimony to be all taken together." An examination of the whole charge will show it to be not only clear and able, but exceedingly fair and impartial.

X.

Form of Judgment.

An objection is made, of a technical character, to the

judgment, on the ground that it awarded an execution. The form of the judgment was, that the plaintiff do have and recover, etc., "and that it have execution therefor, *to be paid in due course of administration.*" (Rec. 16.)

In *Peck Ad'mr* v. *Stevens*, 5 Gilm., 127, the award of execution was thus: "And that execution issue therefor against the goods, chattels, lands, and tenements of the said Jas. W. Stephenson, deceased, in the hands of the said administrator to be administered." This the Supreme Court of Illinois held to be erroneous, and the Court rendered a judgment "to be paid in the due course of administration."

The other cases cited by the Court in 5 Gilman are almost exactly similar, there being in none of them the limitation "to be paid in due course of administration." The objection of the Court of Illinois was to an execution against the property of the decedent not limited by the words "to be paid in the due course of administration." In the judgment at bar the judgment and execution are so limited, and are in perfect harmony with the ruling of the Supreme Court of Illinois.

It has been held that even a law of the State in which a U. S. Court is held, prohibiting the issue of an execution against an executor or administrator, does not prevent the U. S. Court from issuing such execution.

United States v. *Drennen*, Hemp., 320.

It is peculiarly the province of this Court to decide all

questions relating to the process of the United States Courts, irrespective of the decisions of the State Courts.

Riggs v. *Johnson Co.*, 6 Wall., 166.
Butz v. *City of Muscatine*, 8 Wall., 575.

The form of the judgment in this case is believed to be not obnoxious to the rulings of the Supreme Court of Illinois, and it certainly is not open to any just criticism or objection. There may be an objection to an execution to be levied upon the property of the decedent in the hands of his administrator or executor, and under the jurisdiction of the Probate Court, but there can be no objection to an execution "to be paid in the due course of administration."

Respectfully submitted.

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